Petition

81-691

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No.....

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CONOCO INC. (FORMERLY CONTINENTAL OIL COMPANY),
DOUGLAS OIL COMPANY OF CALIFORNIA,
GEORGE EDWARD CLARK
AND WILLIAM L. MARTIN, II,
Petitioners,

v.

PETROL STOPS NORTHWEST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court abused its discretion and failed to follow the remand of this Court and standards prescribed by this Court in allowing Plaintiff in a civil antitrust case full access to all documents produced by defendants in that case to an earlier federal grand jury investigating possible criminal violations of the antitrust laws, without restricting access to those discrete portions of the grand jury documents of defendants and transcripts of testimony of defendants' employees, for which plaintiff asserted any particularized and compelling need in the civil case.

2. Whether individual persons who testified as witnesses before the federal grand jury in an antitrust investigation are entitled to notice of, and have the right to intervene in a proceeding under Rule 6(e) of the Federal Rules of Criminal Procedure by the plaintiff in a civil antitrust case to obtain access to their grand jury testimony, and by their intervention and through their own counsel seek to protect their separate interests in the continued secrecy of their own testimony, apart from the interests and representation of their former employer, a defendant in the civil case.

3. Whether the trial court abused its discretion in denying grand jury witnesses intervention to protect their own interests in continued secrecy of their testimony by (a) applying a standard of determining timeliness which conflicts with decisions of this Court and of other circuit courts of appeals, and (b) concluding that the witnesses were represented adequately by the defendants, in conflict with decisions of this Court and other circuit courts of appeals.

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IN THE

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No. ....

CONOCO INC. (FORMERLY CONTINENTAL OIL COMPANY) AND DOUGLAS OIL COMPANY OF CALIFORNIA, GEORGE EDWARD CLARK AND WILLIAM L. MARTIN, II,

Petitioners,

v.

PETROL STOPS NORTHWEST,

Respondent.[1]

PETITION FOR WRIT OF CERTIORARI

Petitioners Conoco Inc. (formerly Continental Oil Company) and Douglas Oil Company of California, Defendants in the case below, and Petitioners George Edward Clark and William L. Martin, II, Applicants for Intervention in the case below upon application under Rule 6(e) of the Federal Rules of Civil Procedure for access to grand jury testimony and documents, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on June 12, 1981, upon which rehearing was denied August 12, 1981.

OPINION BELOW

The opinion of the Court of Appeals, reported at 647 F.2d 1005, appears in Appendix A. The Court of Appeals' order

[1] The parent company, subsidiaries, except wholly-owned subsidiaries, and affiliates of Conoco Inc. are shown in the Special Appendix following the signature page. Douglas Oil Company is a wholly-owned subsidiary of Conoco Inc.

In addition to the captioned Petitioners and Respondent, Phillips Petroleum Company, Gulf Oil Corporation and Armour Oil Company are defendants in the civil action below.

denying rehearing by Applicants for Intervention Clark and Martin on August 12, 1981, appears in Appendix B. The trial court's Findings of Fact, Conclusions of Law and Order entered April 3, 1980, granting plaintiff access to the grand jury transcripts and documents appears in Appendix C; the trial court's Findings of Facts, Conclusions of Law and Order entered April 23, 1980 denying intervention to Clark and Martin appears as Appendix D; the trial court's Modification of Order entered May 21, 1980 appears as Appendix E; the trial court's Memorandum and Additional Findings of Fact and Conclusions of Law, entered June 4, 1980, appears as Appendix F; the trial court's Minute Order modifying its earlier orders appears as Appendix G. The Minute Order dated May 8, 1980 staying enforcement of judgment appears as Appendix H. The Order on Motion for Stay of Judgment Pending Appeal and For Approval of Supersedeas Bond, dated May 13, 1980, of the trial court staying the release of the grand jury testimony of witnesses Clark and Martin appears as Appendix I. The Order on Motion for Stay of Mandate of the Court of Appeals for the Ninth Circuit filed September 8, 1980, appears as Appendix J. The further order of the Ninth Circuit Court of Appeals extending the stay of mandate until October 11, 1981, appears as Appendix K.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 12, 1981. Rehearing was denied by the Court of Appeals on August 12, 1981. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND JUDICIAL RULES INVOLVED

This case involves the Constitution of the United States, particularly the Fifth Amendment to the Constitution (Appendix L) and Rule 6(e) of the Federal Rules of Criminal Procedure

(Appendix M). The case also involves Rule 24 of the Federal Rules of Civil Procedure (Appendix N).

STATEMENT OF THE CASE

This case involves a petition for access to transcripts of the testimony of witnesses and documents produced before the federal grand jury in Los Angeles investigating rebrand gasoline marketing on the West Coast in 1974-1975. Plaintiff Petrol Stops Northwest had earlier filed an antitrust complaint against petitioners Conoco Inc.[2] and Douglas Oil Company of California, its subsidiary, and several other major oil companies concerning alleged antitrust violations in the retail marketing of gasoline on the West Coast in the late 1960's and early 1970's. Plaintiff filed a petition under Rule 6(e) of the Federal Rules of Criminal Procedure in December 1976, seeking production of all of the testimony of all witnesses employed by Douglas Oil Company of California and Phillips Petroleum Company, both defendants in its civil antitrust case, and all documents produced by those defendants in the rebrand investigation before the Los Angeles federal grand jury. That Rule 6(e) petition for grand jury access was first filed in the United States District Court for the Central District of California, which granted the plaintiff access to the requested grand jury materials in May 1977. That order, affirmed on appeal by the Ninth Circuit Court of Appeals in March 1978, was reversed and remanded by this Court in 1979, *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211. The remand by this Court directed that the Central District of California only evaluate the considerations of grand jury secrecy, and that the trial court in Arizona have the responsibility of considering the Rule 6(e) petition in order for the trial court to determine the questions of relevancy and particularized and compelling need of plaintiff's requested access to the grand jury materials.

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[2] Conoco Inc. was formerly Continental Oil Company, prior to change of name in 1979.

Douglas Oil Company of California has opposed the requested access by plaintiff to the grand jury transcripts of its former employees and the documents which it produced to the grand jury since plaintiff first filed its Rule 6(e) petition for access. Its parent, Conoco Inc., has joined in this opposition since renewal of the Rule 6(e) petition following the remand by this Court.

Petitioners George Edward Clark and William L. Martin, II are ex-employees of Douglas Oil Company of California. These two individuals were among the witnesses who testified before the federal rebrand grand jury in Los Angeles. They did not have notice of the original Rule 6(e) petition filed by plaintiff in 1976 and did not participate in the original proceedings in the Central District of California or the appeals from that court. Upon remand from this Court in *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211, plaintiff renewed its efforts to gain access to the rebrand grand jury transcripts and documents.

Plaintiff filed a limited proceeding before the Central District of California for the sole purpose of evaluating considerations pertaining to grand jury secrecy, and then on February 13, 1980, filed a new petition in the district court below for production of grand jury transcripts and documents. The petition for access alleged only a particularized and compelling need for the grand jury materials to impeach, refresh recollections or test credibility of certain interrogatory answers denying price communications by defendants.

Douglas Oil Company of California and Conoco Inc., both Petitioners here, and Phillips Petroleum Company, defendants in the civil action below, who had also produced witnesses and documents to the rebrand grand jury, opposed plaintiff's further Rule 6(e) petition. Subsequent to filing of this new petition, but prior to hearing, Petitioners Clark and Martin sought to appear through their counsel to represent their own interests in opposition to release of their individual transcripts of testimony before

the rebrand grand jury. These witnesses Clark and Martin sought to intervene in the trial court below. They had not previously been parties to the civil action, and appeared through their own counsel, who did not represent any of the parties in that civil action.

The trial court on April 3, 1980, entered its order granting plaintiff access to all of the transcripts and documents requested, including both the transcripts of testimony of all employees and ex-employees of Douglas Oil Company and Phillips Petroleum Company and all documents produced by those two defendants to the rebrand grand jury. The court granted access to all requested grand jury transcripts and documents without limiting disclosure to those discrete portions for which Plaintiff had even purported to show a particularized and compelling need to impeach, refresh recollection and test credibility. The court also ordered disclosure of all grand jury documents produced by defendants without even reviewing those documents.[3] The trial court entered a further order on April 23, 1980 denying intervention to Clark and Martin. On May 8, 1980 the court stayed its order as to release of Clark's and Martin's transcripts pending completion of judicial review, and by subsequent orders entered May 21, 1980 and June 4, 1980 modified its original orders. The trial court issued a final Minute Order on October 20, 1980, further modifying its original April 2 order while that order was on appeal.

Douglas Oil Company of California and Conoco Inc., filed their notice of appeal to the United States Court of Appeals for the Ninth Circuit on April 30, 1980, appealing the April 3, 1980 order of the trial court granting plaintiff access to the grand jury materials. Subsequently they supplemented their appeal to address the further modifications by the lower court, including the October 1980 Minute Order.

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[3] The court's letter dated July 14, 1980 discloses that the trial court never had the grand jury documents before it. (Appendix O hereto).

Applicants for intervention Clark and Martin filed their notices of appeal to the Court of Appeals for the Ninth Circuit appealing the orders of the trial court denying their interventions. The Court of Appeals issued its opinion and order on June 12, 1981, affirming in part and vacating in part and remanding. That opinion affirmed both the basic order of April 3, 1980 granting access to the grand jury materials and the April 23, 1980 order denying interventions. It vacated and remanded the post-appeal October 20, 1980 Minute Order allowing copying of the transcripts. Clark and Martin filed their separate petitions for rehearing of that order. The petitions for rehearing were denied by the Court of Appeals on August 12, 1981. Judge Alarcon would have granted rehearing. This petition for writ of certiorari is timely filed within the time allowed under the Rules of this Court and provisions of 28 U.S.C. Sec. 2101(c).

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S REVIEW IS NECESSARY TO COMPEL THE TRIAL COURT TO FOLLOW THE MANDATE OF THIS COURT ON REMAND AND TO APPLY PROPERLY THE CRITERIA ESTABLISHED BY THIS COURT FOR SEEKING ACCESS TO GRAND JURY MATERIALS

This petition presents to this Court the question of whether the lower courts have followed the mandate of this Court in *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211, and whether the trial court has properly applied the standards and the criteria set forth by this Court in allowing access to grand jury transcripts and documents. The question goes beyond whether the courts below gave lip service to recitals of those standards and criteria as set forth by this Court in *Douglas Oil Company*, *supra*, and *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958). The question calling for review by writ of certiorari is whether the trial court did in fact follow the

mandate and apply properly the controlling standards prescribed by that mandate.

The trial court upon remand allowed full and complete release of *all* of the grand jury testimony and documents pertaining to defendants below, Douglas Oil Company of California and Phillips Petroleum Company. No effort was made to limit the disclosure to those discrete portions of transcripts or documents which might arguably be relevant to plaintiff's case. No effort was made to limit disclosure to discrete portions of the transcripts and documents which would pertain to the particularized and compelling need which plaintiff contended required access. No review was even made of the documents released, which the trial court did not even look at.

The only ground for particularized and compelling need alleged by plaintiff and the only ground before the court below upon which to grant any access to the grand jury materials, was to impeach, refresh recollections and test credibility of witnesses on deposition or at trial with regard to one single stated line of inquiry: the question of price communication among defendants as that subject was treated in a limited series of interrogatories, in answer to which Douglas Oil Company of California had denied any price communications with its competitors or co-defendants.[4]

This Court in remanding plaintiff's earlier petition for grand jury access reaffirmed the standards set in *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958). There the Court formulated the requirement that disclosure of grand jury testimony is justified only after a party shows both a particularized and a compelling need for the testimony. *Procter & Gamble* had stated the requirement for disclosure by referring to the error of the lower court in that case in failing to apply the proper standard:

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[4] Plaintiff's pleading under the Rule 6(e) application (Appendix P) sets out the only allegation of particularized and compelling need.

> "The court held that a much more particularized, more discrete showing of need is necessary to establish 'good cause'. The court made no such particularized finding of need in the case of any one witness. It ordered that the entire transcript be delivered over to the appellee. It was undoubtedly influenced by the fact that this type of case is complex, drawn out, and expensive to prosecute and defend". 356 U.S. at 683.

This court in *Procter & Gamble* held that the lower court there had exceeded the proper standards in failing to make a particularized finding of need in the case of any witness, and in simply giving over the entire transcripts without restricting disclosure to those discrete portions required by the showing of particularized and compelling need.

In *Douglas Oil Company, supra,* remanding the earlier requests for grand jury access in this very case, the Court reaffirmed the criteria established in *Procter & Gamble, supra,* and emphasized that access to grand jury material must be "structured to cover only material so needed" to satisfy the particularized and compelling need asserted by the Rule 6(e) petitioner. 441 U.S. at 222.

Certiorari is required in the present case to review the failure of the trial court below to make any particularized finding of need in the case of any witness and failure to limit any grand jury disclosure to only those discrete portions of transcripts or documents required to impeach, refresh recollection or test credibility of Douglas Oil Company of California's witnesses and interrogatory answers on the single question of competitive price communications. If the standards and criteria of *Douglas Oil Company, supra,* and *Procter & Gamble, supra,* are to have meaning and vitality, this Court should review the action of the lower court in failing to apply those standards and criteria properly to restrict access to grand jury transcripts and documents. Otherwise, the standards erode to allow access to any and all requested grand jury documents upon the barest allegation of

particularized and compelling need for any part of the grand jury materials. Grand jury secrecy becomes victim to any civil plaintiff upon showings far less adequate than this Court has held required.

Review upon certiorari is necessary to enforce this Court's mandate. *Utah Public Service Commission* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 471-72 (1969). There, on direct appeal this Court dealt with enforcement of its mandate requiring complete divestiture under the Clayton Act. The lower court on remand had not properly followed the mandate by directing complete divestiture. *Ibid.*, 395 U.S. at 471. In the present case, the trial court did not properly apply the particularized and compelling need or discrete disclosure standards of this Court's mandate on remand. The Court of Appeals decision below affirmed the trial court in these respects. Certiorari will permit enforcement of the mandate.

This Court has on occasion exercised its jurisdiction on writs of certiorari on repeated occasions in the same case to correct repeated failures of lower courts to adhere to or apply correctly the Court's original decision. In a long-litigated sequence of cases involving the State of Washington's power to regulate fishing activities of the Puyallup Indians, the Court heard the case on three separate occasions on writs of certiorari.

In the first case, *The Puyallup Tribe* v. *Department of Game of Washington*, 391 U.S. 392 (1968), the Court affirmed the Washington Supreme Court's decision that the state could constitutionally regulate the fishing activities of the Indian tribe. Following remand in the state courts, the particular state fishing regulations were upheld by the Washington Supreme Court, and this Court granted a second writ of certiorari to review the state court's decision on remand. *Department of Game of the State of Washington* v. *The Puyallup Tribe*, 414 U.S. 44 (1973). In that

case, the Court reversed and remanded with directions to consider the state's power to regulate fishing in relation to conservation policies there involved. Following still further decisions on remand in the state courts, the Court again granted certiorari, for the third time, in *Puyallup Tribe* v. *Department of Game of the State of Washington*, 433 U.S. 165 (1977), to review the state Supreme Court's decision upholding Washington's regulation of the Indian tribe's fishing on and off the reservation. Again, the Court vacated and remanded, to clarify and enforce its earlier decisions respecting the extent and manner of state jurisdiction over fishing by the Indians.

In the present case, as in the *Puyallup* cases, certiorari is appropriate to clarify and enforce the earlier decision of the Court, to apply properly the criteria and standards governing access to grand jury transcripts and documents set forth in *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979) and *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958).

II. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON BOTH THE ISSUE OF GRAND JURY ACCESS AND THE ISSUE OF INTERVENTION IN RULE 6(e) PROCEEDINGS

A. Grand Jury Access

The decision of the Court of Appeals below affirmed the trial court in allowing access to all of the requested grand jury transcripts and documents without adequate showing of particularized and compelling need to support that broad request. That decision failed to require that disclosure be limited to those discrete portions of the requested transcripts and documents, if any, required to impeach, refresh recollections or test credibility of

Douglas Oil Company of California's responses to interrogatories concerning denial of competitive price communications and testimony on deposition of witnesses on that particular subject matter. The decisions of the Court of Appeals below conflicts in these respects with the decisions of this Court in *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979) and *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958). This conflict is discussed under Point I, *supra*.

B. Intervention

The decision of the Court of Appeals below, conflicts with the decisions of this Court in *National Association for the Advancement of Colored People* v. *State of New York*, 413 U.S. 345 (1973) and decisions of the United States Court of Appeals for the Fifth Circuit in *Stallworth* v. *Monsanto Company*, 558 F.2d 257 (5th Cir. 1977), *McDonald* v. *E. J. Lavino Company*, 430 F.2d 1065 (5th Cir. 1970) and *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Company*, 420 F.2d 1103 (5th Cir. 1970), and the United States Court of Appeals for the Eighth Circuit in *Kozak* v. *Wells*, 278 F.2d 104 (8th Cir. 1960).

The Court of Appeals below affirmed the trial court in denying intervention to George Edward Clark and William L. Martin, II, two individuals who had testified before the rebrand grand jury as former employees of Douglas Oil Company of California. Denial of intervention rested primarily on timeliness as determined by the trial court, and secondarily on the trial court's conclusion that the interests of Clark and Martin were adequately represented by the defendants in the civil case below.

In finding the interventions untimely, the courts below looked to the time of intervention and the apparent delay in seeking intervention without regard to the fact that the proposed interventions at the time made would not result in prejudice because of delay. The courts below also held the appellants for intervention to a severe test of timeliness by imputing to both appellants peripheral knowledge which their counsel may have

had at an earlier time as to the pendency of plaintiff's first Rule 6(e) petition, at a time when that counsel was not even representing both of the appellants for intervention. The courts below did not take account of the fact that neither appellant himself had actual notice until very shortly prior to his effort to intervene on the second Rule 6(e) petition filed by plaintiff after remand from this Court. Neither did the courts below give any consideration to the fact that until December 1979, shortly before plaintiff filed its second Rule 6(e) petition, the entire matter of grand jury access and requests for the transcripts of the individuals Clark and Martin had been pending in this Court and earlier in the Court of Appeals for the Ninth Circuit on appeal from the original Rule 6(e) petition; appellants for intervention had no legal opportunity or position to raise intervention during the pendency of the earlier appeals.

The standards imposed by the Court of Appeals below and the trial court in denying intervention, particularly on the grounds of untimeliness, conflict with the standards and holdings of this Court and of the United States Courts of Appeals for the Fifth Circuit and Eighth Circuit in the cases cited above. This Court should grant the petition for writ of certiorari to resolve the conflicting law with respect to the right of appellants to intervene, either as a matter of right or as a matter of sound judicial discretion, in Rule 6(e) proceedings to protect their own interests in the continued secrecy of their own testimony before a federal grand jury.

Although this Court in *National Association for the Advancement of Colored People* v. *State of New York*, 413 U.S. 345 (1973) upheld on direct appeal the ruling of the district court in denying intervention on grounds of untimeliness, *inter alia*, the Court stated the accepted principles governing intervention as follows:

> "Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely

dispositive. Timeliness is to be determined from all the circumstances". *Ibid*, 413 U.S. at 366.

In the *NAACP* case, *supra*, the lower court had given proper consideration to the factors relating to timeliness; it had also considered several other factors besides timeliness which all weighed against intervention. In the present case the trial court below failed to apply the accepted principles enunciated in *NAACP* v. *New York, supra*. The lower courts made the question of timeliness solely dispositive, and failed to determine timeliness from all the circumstances, contrary to this Court's guidance of the principles controlling intervention.

More particularly, the decision of the court of appeals below, affirming the trial court's denial of intervention, conflicts with the pertinent decisions of other circuit courts on the question of intervention. The decision of the United States Court of Appeals for the Fifth Circuit in *Stallworth* v. *Monsanto Company*, 558 F. 2d 257 (1977) is the leading circuit court decision on the question of timeliness of intervention. That decision is squarely in conflict with the decision of the Court of Appeals for the Ninth Circuit below. In the *Stallworth* case, the Court of Appeals for the Fifth Circuit reversed the decision of the district court there which had denied petitions for leave to intervene on grounds of untimeliness. The Fifth Circuit, interpreting and applying the decision of this Court in *NAACP* v. *New York*, 413 U.S. at 366, went beyond the general statement of principles for intervention and sought to formulate specific guidelines to resolve timeliness of intervention. *Stallworth* v. *Monsanto Company*, 558 F.2d at 264. Analyzing the provisions of Rule 24, decisions of this Court, and its own precedents, the Fifth Circuit in *Stallworth* defined the discretionary power of the district courts on intervention "by distilling four factors that must be considered in passing on the timeliness of a petition for leave to intervene." *Ibid*. The Court of Appeals there stated the following factors must be considered in determining timeliness of intervention:

Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene. 558 F.2d at 264.

Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case. 558 F.2d at 265.

Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied. 558 F.2d at 265.

Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely. 558 F.2d at 266.

Applying these four factors in *Stallworth*, the Court of Appeals for the Fifth Circuit concluded that the district court there had abused its discretion in ruling that the petitions for leave to intervene were untimely. The facts underlying the *Stallworth* case were very much like those in the case below. The lower court there had mistakenly used an unspecified time when it supposed that the appellants seeking intervention must have learned of the pendency of the action rather than the time when they did know of their interest in the action as a starting point in assessing whether the would-be intervenors acted promptly to protect themselves. *Stallworth* v. *Monsanto Company*, 558 F.2d at 267. In the present case, the district court below was unable to determine when Petitioner Clark first became aware his testimony was being sought (App. D, at A-22).

Though the *Stallworth* intervenors filed their petition less than one month after learning of their interest in that case, petitioner Martin did not learn of the request for his grand jury testimony in the trial court below until March 12, 1980, and petitioner Clark did not learn of the request for his transcript until March 24-25, 1980, as shown by their own affidavits in the

record below; their counsel filed papers in the trial court below setting forth their interest and objections on March 28, 1980, within two weeks of the time either of Petitioners had learned of the Rule 6(e) petition in the trial court below, and within three days of the time that Petitioner Clark had his first indication of any effort to obtain his grand jury transcript. This is not untimely under the criteria set forth by the Fifth Circuit Court of Appeals in *Stallworth* v. *Monsanto Company, supra.*

The court of appeals below also conflicts with the decision of the Fifth Circuit in *Stallworth, supra,* in applying an incorrect legal standard to determine prejudice relative to intervention. The relevant issue, as stated by the Fifth Circuit in *Stallworth, supra,* 558 F.2d at 267, "is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case". Less than thirty days "delay" in *Stallworth* did not constitute prejudice; three days for Petitioner Clark, and sixteen days, for Petitioner Martin, in the present case did constitute prejudice to the courts below. Also, the court of appeals below failed to consider the third and fourth factors set forth in *Stallworth,* 558 F.2d at 265-267. The court below did not consider either the extent of prejudice that would-be intervenors Clark and Martin may suffer on denial of intervention, or existance of unusual circumstances militating either for or against a determination that the application is timely. Petitioners Clark and Martin are undeniably prejudiced by denial of their interventions since they have no opportunity to protect their interests opposing the release of their own grand jury transcripts. Finally, the unusual circumstances in the record below pertaining to their late knowledge of facts necessitating their intervention and the inadequacy of their representation by counsel for Petitioners Douglas Oil Company of California and Conoco Inc. should have been, but were not, considered by the court of appeals below.

The earlier decisions of the United States Court of Appeals for the Fifth Circuit in *McDonald* v. *E. J. Lavino Company*, 430 F.2d 1065 (1970) and *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Company*, 420 F.2d 1103 (1970) also follow the more reasonable analysis of the requirements for intervention established by that circuit. The decision of the court of appeals below conflicts with the Fifth Circuit in upholding the denial of interventions by the trial court for untimeliness without properly considering the prejudice or lack of prejudice to the parties to the litigation. There cannot have been any real prejudice to plaintiff in the litigation below by the interventions of Clark and Martin before hearing on the Rule 6(e) petition for access to their grand jury transcripts, long before any trial date had even been considered, while discovery was still continuing (as it is even this day still continuing), and when their intervention would have served no other purpose than to permit them to protect their own interests in opposing release of their own grand jury transcripts. Their interventions would not have impeded in any manner the trial court's consideration of the Rule 6(e) petition or the conduct of the case as a whole.

The decision of the court of appeals below further conflicts with the decision of this Court in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), decisions of the Court of Appeals for the District of Columbia Circuit in *Hodgson* v. *United Mine Workers*, 473 F.2d 118 (1972), and *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904 (1977) and decisions of the Court of Appeals for the Eighth Circuit in *Kozak* v. *Wells*, 278 F.2d 104 (1960). In *Trbovich*, this Court held that an applicant for intervention overcomes the provision of Rule 24(a) regarding adequacy of representation by existing parties if he "shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal" 404 U.S. at 538, n. 10. The District of Columbia Circuit Court of Appeals has closely followed the *Trbovich* standard in *Hodgson* v. *United Mine Workers*, 473

F.2d 118, 130 (1972) and in *Natural Resources Defense Council* v. *Costle*, 561 F.2d 904, 911-13 (1977). In *Kozak*, the Eighth Circuit upheld the proposed intervention as a matter of right under Rule 24, on a showing that representation *may* be inadequate, rather than requiring showing that representation was inadequate. The Eighth Circuit there also considered the degree of prejudice relating to denial of intervention.

The courts below place a much heavier burden on the applicants for intervention than the minimal showing that representation by the defendants *may* be inadequate, under the standard established by the above cases. Under the decisions below, Petitioners Clark and Martin would have to show, in effect, that the defendants Conoco and Douglas Oil Company did not make any arguments supporting their intervention, or even that the defendants openly opposed them. That is clearly contrary to the standard of this Court in *Trbovich* v. *United Mine Workers, supra*, and the other circuit decisions which require only a showing that other representation may be inadequate. In these respects, the decision of the court of appeals below conflicts. Counsel for Douglas Oil Company of California and Conoco Inc. cannot adequately represent Martin and Clark or their individual interests. The witnesses' own interests in grand jury secrecy are personal to them, not to their ex-employer.[5]

Both this Court and the Courts of Appeals for the Fifth Circuit and Eighth Circuit have held that a trial court must consider the reasons for the length of delay in seeking intervention and the prejudice or lack of prejudice resulting from intervention. *NAACP* v. *New York*, 413 U.S. 345 (1973); *Stallworth* v. *Monsanto Company*, 558 F.2d 257 (5th Cir. 1977); *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Company*, 420 F.2d 1103 (5th Cir. 1970); and *Kozak* v. *Wells*, 278 F.2d 104

[5] The trial court below had earlier ordered counsel for these defendants not to represent ex-employees of Douglas Oil Company, because of possible conflicts of interest.

(8th Cir. 1960). These cases suggest that courts must look to the reason for delay, not merely to the fact of delay itself, and to the prejudice resulting from delay in seeking intervention, not to prejudice from intervention itself. In these respects the decision of the Court of Appeals below conflicts, in failing to consider either the reasons for, or lack of prejudice resulting from, the minimal delay of Petitioners Martin and Clark in seeking intervention in the trial court, and wrongly concluding they were adequately represented by other counsel.

This Court should grant certiorari to resolve the conflicts among the circuits in defining the standards applicable and factors to be considered in determining interventions on grounds of both timeliness and representation.

III. THIS CASE RAISES IMPORTANT QUESTIONS OF JUDICIAL POLICY AND QUESTIONS OF LAW WHICH SHOULD BE DECIDED BY THIS COURT REGARDING ACCESS TO GRAND JURY MATERIALS AND INTERVENTION BY GRAND JURY WITNESSES TO PROTECT THEIR OWN TESTIMONY

Two important questions of law and judicial policy are presented for review by this Court upon writ of certiorari. Petitioners Douglas Oil Company of California and Conoco Inc., as defendants in the trial court below and real parties in interest in the Rule 6(e) petition for grand jury access by plaintiff below, raise a substantial question which needs to be settled by this Court as to the meaning and vitality to be given to the criteria set by this Court for obtaining access to grand jury transcripts and documents. Petitioners Clark and Martin, who have sought intervention in the trial court below to protect their personal interests in release of their individual grand jury transcripts, present important questions which have not been decided, but which should be decided by this Court, as to the rights of witnesses before federal grand juries to intervene in Rule 6(e) proceedings to object to disclosure of their testimony or

otherwise protect their interests in the continued secrecy of that testimony.

Aside from the question of enforcing compliance with its own remand in *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211, discussed under Point I, *supra*, this petition raises the question for review upon certiorari of whether access to grand jury materials is to be limited by the standards of the *Douglas Oil Company* case, *supra*, and *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958). Either the standards and criteria set by this Court in those cases must apply and have meaning to restrict access to grand jury materials in accordance with the decisions of this Court, or the policy of secrecy for grand jury disclosure may be destroyed. Although this Court has clearly defined standards and criteria which should be followed respecting disclosure of grand jury testimony and documents, the question now needs settling definitively whether those standards must be followed by the lower courts in deciding Rule 6(e) petitions for grand jury access. This Court should grant the writ of certiorari to make clear that its standards pertaining to release of grand jury materials must be followed with precision.

A totally separate question arises in connection with the proposed interventions in the trial court below of Petitioners Clark and Martin. The courts have not previously clearly settled the law relating to the interests which individual witnesses before federal grand juries have in the keeping of the policy of secrecy with respect to their own testimony. Not only the rights of these individual petitioners to intervene in the trial court proceedings involving requests for access to their own testimony, but the broader question of judicial policy toward protecting the interests of individuals in the continued secrecy of their testimony before grand juries require consideration by this Court. At the heart of these questions lie fundamental considerations of law and judicial policy relating to the traditional secrecy of the grand jury process. This Court should grant the petition for writ

of certiorari to resolve these questions and address definitively the interests of individuals in the continued secrecy of their own testimony before grand juries.

The question of individual witnesses' rights to intervene in judicial proceedings to protect the secrecy of their grand jury testimony raises other issues of notice to the witnesses of requests for their testimony and Fifth Amendment issues of the witnesses' rights to privacy in protection of grand jury secrecy. Petitioners Clark and Martin have strong interests in keeping the secrecy of their grand jury testimony. They had been named as unindicted co-conspirators in the Government's bill of particulars in the criminal case growing out of the grand jury investigation in which they testified, and their affidavits supporting intervention established that they relied upon the policy of grand jury secrecy in giving their testimony before the grand jury. Disclosure of their testimony, without both notice to them and right to be heard upon intervention implicates fundamental constitutional interests of liberty and privacy contrary to the due process safeguards of the Fifth Amendment. The rights of grand jury witnessess to adequate notice of requests for their grand jury transcripts, and their rights to intervene in opposition to disclosure involve substantial questions of their liberty and property in relation to the Fifth Amendment guarantees of due process. These constitutional issues affecting disclosure of individuals' testimony before federal grand juries should be resolved by this Court.

This Court recognized the rights of individuals to due process, "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him". *Goss* v. *Lopez*, 419 U.S. 565, 575 (1975). The requirement of due process applies here as much under the Fifth Amendment as in *Goss* under the Fourteenth. Clark and Martin have substantial interests of constitutional magnitude in the disclosure of their federal grand jury testimony. They may suffer more than mere

criticism, ridicule or loss of esteem. Disclosure relating to a grand jury investigation which resulted in criminal prosecutions naming the witnesses as unindicted co-conspiraters may result in economic loss or even civil liability to them.

Further constitutional interests of privacy, protected by the policy of grand jury secrecy, are involved too. *Cf., Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *United States* v. *Miller*, 425 U.S. 435 (1976); and *Providence Journal Co.* v. *FBI*, 602 F.2d 1010 (1st Cir. 1979). The rights of Clark and Martin to privacy, in the form of secrecy of their grand jury testimony, are no less than the rights constitutionally protected by the courts in the above cases.

CONCLUSION

Petitioners respectfully submit the writ of certiorari should be granted to enforce the remand of this Court in *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211, to bring the judgment and opinion of the Court of Appeals below into conformity with the applicable decisions of this Court and to resolve conflicts of the decision below with those of other circuit courts of appeals and to settle important questions of federal law and judicial policy relating to access to grand jury materials and the rights of individuals to protect the continued secrecy of their grand jury testimony.

Respectfully submitted,

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SPECIAL APPENDIX
PARENT, SUBSIDIARIES AND AFFILIATES OF CORPORATE PETITIONERS

Petitioner Conoco Inc. (formerly Continental Oil Company), is a wholly-owned subsidiary of E. I. DuPont de Nemours and Company. Conoco Inc. has the following subsidiaries (other than wholly-owned subsidiaries) or affiliates:

Big Sky of Montana Realty, Inc.
Calcasieu Chemicals Corporation
Condea Chemie, GmbH
CitCon Oil Corporation
Conch International Methane, Ltd.
Conoco, A.G.
- Petroquimica Espanola, S.A. (Petresa)*
- T.A.L. (Austria)*
- T.A.L. (Italy)*
- T.A.L. (Luxembourg)*

Conoco Limited
Conoco Management Company
- Conoco Exploration, Ltd.*

Conoco Mineraloel GmbH
- T.A.L.*

Conoco North Sea, Inc.
- K/s Statfjord Transport A.S. & Co.*
- Statfjord Transport A.S.*

Conoco Norway Inc.
- K/s Statfjord Transport A.S. & Co.*
- Statfjord Transport A.S.*

Consolidated Coal Company — 100%
- Bishop Coal Company*
- Cardinal River Coals, Ltd.*
- Contochu, Inc.*
- Harmar Coal Company*
- Itmann Coal Company*

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* Indicates partially owned company of wholly-owned subsidiary.

Mathies Coal Company*
Consolidated Coal Sales Company*
Wolfpen Knob Development Company*
Stone Cove Coal Company*
Continental Carbon Company
Carbon Black Espanola, S.A.
Columbian Continental Europa, S.p.A.
Compagnie Francaise du Carbon Black, S.A.
Continental Carbon Australia Pty. Limited
Continental Columbian Carbon Nederland, B.V.
Continex Francaise S.A.R.L.
Continex Nederland B.V.
Continex S.r.l.
Lucky Continental Carbon Co., Ltd.
Toyo Continental Carbon, Ltd.
Conoco (U.K.) Limited
Associated Petroleum Terminals (Immingham) Ltd.*
Cliffe Storage, Ltd.*
Crude Oil Terminals, Ltd.
Humber Oil Terminals Trustee, Ltd.*
Petroleum Storage, Ltd.*
Warwickshire Oil Storage, Ltd.*
Continental Pipe Line Company
Colonial Pipeline*
Dixie Pipeline*
Lake Charles Pipe Line*
Pioneer Pipe Line Company*
Platte Pipe Line*
Seadock, Inc.*
Seaway Pipeline, Inc.*
West Shore Pipe Line*
Yellowstone Pipe Line*
Explorer Pipeline Company
Felix Oil Company
Kettleman North Dome Association

Long Beach Oil Development Company
Maritime Protection A/S
Nippon Aluminum Alkyes, Ltd.
NissanConoco Corporation
Oil Shippers Service, Inc.
OMW (Karlsruhe)
Pasa Petroquinica Argentina, S.A.
Petroleum Terminals, Inc.
Petrocokes, Ltd.
San Jacinto Eastern Corporation
Iricon Agency, Ltd.*
Selang Ltd.
Southern Facilities, Inc.
Standard Shale Products Company

Petitioner Douglas Oil Company of California is a wholly-owned subsidiary of Conoco Inc.

Petitioners George Edward Clark and William L. Martin, II are natural persons.

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CONOCO INC. (FORMERLY CONTINENTAL OIL COMPANY),
DOUGLAS OIL COMPANY OF CALIFORNIA,
GEORGE EDWARD CLARK
AND WILLIAM L. MARTIN, II,

Petitioners,

v.

PETROL STOPS NORTHWEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Opinion of Court of Appeals, Ninth Circuit, Decided June 12, 1981.

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

v.

CONTINENTAL OIL COMPANY and
Douglas Oil Company of California,
Defendants-Appellants,

and

George Edward Clark and William L.
Martin, II, Applicants for
Intervention.

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

v.

CONTINENTAL OIL COMPANY and
Douglas Oil Company of California,
et al., Defendants.

and

George Edward Clark and William L.
Martin, II, Appellants and Applicants
for Intervention.

Nos. 80-5321, 80-5320, and 80-5470.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 13, 1980.

Decided June 12, 1981.

Civil antitrust plaintiff sought access to testimony and documents given to grand jury during an investigation leading to criminal antitrust indictments against the defendants. Initial order granting request was affirmed, 571 F.2d 1127. The Supreme Court reversed, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156. On remand, the United States District Court for the District of Arizona, James A. Walsh, J., entered new order

granting access to grand jury materials, and appeal was taken. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) district court did not abuse discretion in finding that civil plaintiff's need for disclosure of contested transcripts and documents outweighed need for continued grand jury secrecy or in determining that plaintiff had shown a compelling and particularized need to use transcripts and documents to impeach, refresh recollections and test credibility; and (2) it was not error to deny request by two of defendant's former employees to intervene as of right to be heard in connection with petition to disclose their grand jury testimony.

Affirmed in part, vacated in part and remanded.

1. Grand Jury 41

Grants of disclosure of grand jury documents and testimony are reviewed for abuse of discretion. Fed.Rules Cr.Proc. Rule 6(e), 18 U.S.C.A.

2. Monopolies 25(8)

It was not abuse of discretion to order disclosed to private antitrust plaintiff the testimony and documents given to grand jury during investigation that led to criminal antitrust indictments against the civil defendants for conspiring to fix prices, with defendants pleading nolo contendere, where transcripts of defendants' employees had been released to defendants and plaintiffs sought transcripts and documents to impeach, refresh recollections and test credibility. Fed.Rules Cr.Proc. Rule 6(e), 18 U.S.C.A.

3. Grand Jury 41

Right of grand jury witnesses to be heard in connection with requests for disclosure of their grand jury testimony, which was sought by plaintiff in related civil action, was properly evaluated by applying the standards for intervention as of right. Fed.Rules Civ.Proc. Rule 24(a)(2), 28 U.S.C.A.

4. Federal Courts 587

Denial of a motion to intervene as of right is an appealable final order. Fed.Rules Civ.Proc. Rule 24(a)(1), 28 U.S.C.A.

5. Federal Civil Procedure 311

A motion to intervene as of right meets requirements of federal rules if it is timely, movant asserts an interest relating to the property or transaction that is the subject of the action, without intervention disposition of the action may as a practical matter impair or impede movant's ability to protect that interest and such interest is inadequately represented by the other parties. Fed.Rules Civ.Proc. Rule 24(a)(2), 28 U.S.C.A.

6. Federal Courts 817

Ruling that an intervention motion is untimely will be overturned only for abuse of discretion. Fed.Rules Civ.Proc. Rule 24, 28 U.S.C.A.

7. Federal Civil Procedure 320

It was not abuse of discretion to deny motion by former employees of two defendants to intervene in civil antitrust suit to be heard in connection with plaintiff's request for discovery of employees' testimony before grand jury which returned indictments against their employers where there was delay of over two years between time one employee was aware that civil plaintiff sought his testimony and intervention, intervention was sought one day before hearing on disclosure request and employees' interest had been capably represented by former employer, which had obtained transcripts of their grand jury testimony. Fed.Rules Civ.Proc. Rule 24(a)(2), 28 U.S.C.A.

8. Federal Civil Procedure 321

Burden is on an intervenor to demonstrate that the conditions for intervention, including timeliness, are satisfied. Fed.Rules Civ.Proc. Rule 24, 28 U.S.C.A.

9. Federal Courts 683

Filing of notice of appeal transferred jurisdiction over any matters involved in the appeal from district court to Court of Appeals and even if district court's subsequent order granting leave to examine grand jury documents was a mere correction of clerical mistake or oversight in connection with prior order, which provided that no transcript or copy could be further reproduced, district court was without power to issue that order without obtaining leave of reviewing court. Fed.Rules Civ.Proc. Rule 60(a), 28 U.S.C.A.

Appeal from the United States District Court for the District of Arizona.

Before PREGERSON and ALARCON, Circuit Judges, and SMITH*, District Judge.

PREGERSON, Circuit Judge:

These consolidated appeals stem from efforts by Petrol Stops Northwest [Petrol Stops], a private antitrust plaintiff, to gain access to testimony and documents given to a grand jury during an investigation that led to a criminal antitrust indictment against appellant Douglas Oil Company [Douglas], one of the defendants in Petrol Stops's civil suit. The matter is before us for the second time. In an earlier opinion we affirmed a district court's order granting Petrol Stops's request. *Petrol Stops Northwest* v. *United States*, 571 F.2d 1127 (9th Cir. 1978). The Supreme Court reversed, however, because the California district court having custody of the grand jury materials had acted without drawing on the superior knowledge of the Arizona district court where the civil suit was pending. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). On remand the procedure outlined by the

Supreme Court has been followed by the two district courts and has resulted in a new order by the Arizona district court granting Petrol Stops the access it seeks. Appellants appeal from this order. The individual appellants appeal also from the denial of their motion to intervene. We affirm, but vacate the Arizona district court's attempted modification of the order from which two of these appeals are taken.

I.

In December 1973, Petrol Stops filed a civil antitrust action in the District Court for the District of Arizona against twelve oil companies, including Douglas and its parent, appellant Continental Oil Company [now Conoco]. While this proceeding was in a pre-trial stage, a lengthy federal investigation in the Central District of California culminated in March 1975 in a grand jury indictment of six companies, including Douglas and the Phillips Petroleum Company [Phillips], for conspiring to fix prices. All defendants in this criminal prosecution initially pleaded not guilty but changed their pleas to *nolo contendere*. Before changing their pleas, Douglas and Phillips asked the District Court for the Central District of California for transcripts of the testimony their employees had given before the grand jury; this request was granted.

In December 1976, Petrol Stops petitioned the District Court for the Central District of California, under Fed.R.Crim.P. 6(e), for disclosure of the transcripts furnished to Douglas and Phillips and the documents subpoenaed by the grand jury from those companies. The district court granted Petrol Stops's petition, subject to protective conditions, and we affirmed. *Petrol Stops Northwest* v. *United States*, 571 F.2d 1127 (9th Cir. 1978).

The Supreme Court reversed, holding that the California district court had abused its discretion by evaluating Petrol Stops's need for the transcripts and documents without sufficient knowledge of the details of the civil suit pending in Arizona. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 228-29, 99

S.Ct. 1667, 1677-1678, 60 L.Ed.2d 156 (1979). The Court directed that, upon remand, the California district court should make a written evaluation of the need for continued grand jury secrecy and a preliminary determination of the appropriateness of disclosure. The materials were then to be sent to the Arizona district court, which would make the final determination on whether to grant disclosure.

That procedure has now been followed. The California district court, after a hearing, filed on February 6, 1980 its preliminary determination that the need for continued grand jury secrecy should be "lightly weighted." The requested materials were then forwarded to Arizona where a hearing was held on March 31 on Petrol Stops's petition for disclosure. On April 3, 1980, the Arizona district court granted Petrol Stops access to the requested materials, finding that portions of the transcripts could be used "to impeach, refresh the recollection, or test the credibility of witnesses, . . . who testified before the grand jury."

At the March 31 hearing, counsel for appellants Clark and Martin appeared and sought to be heard on the merits of Petrol Stops's petition. Clark and Martin were former Douglas executives whose testimony before the Central District of California grand jury was among that which Petrol Stops was seeking. The court refused to hear any arguments on their behalf until they properly sought to intervene, pursuant to Fed.R.Civ.P. 24. On April 10, 1980 (a week after Petrol Stops's disclosure petition had been granted) Clark and Martin formally moved to intervene in the action to oppose disclosure. After a hearing, on April 21, the court entered an order denying the application to intervene as untimely and because the would-be intervenors failed to show that their interests were not adequately protected by the existing parties. The court also found that intervention would "unduly prejudice" Petrol Stops. After rehearing, the court reaffirmed its denial of the intervention motion and noted its suspicion that Douglas was attempting to relitigate the issues by sponsoring closely allied interests.

II.

Appellants Douglas and Conoco contend that the Arizona district court abused its discretion by ordering disclosure of the testimony of their employees. They argue that the grand jury testimony is not relevant to the civil action, that no particularized or compelling need for the disclosure has been shown, and that it was error to grant Petrol Stops full access to all the requested materials rather than limiting access to "discrete portions" for which a "particularized need" had been shown.

[1,2] Grants of disclosure under Fed.R.Crim.P. 6(e) are reviewed for abuse of discretion. See *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 228, 99 S.Ct. 1667, 1677, 60 L.Ed.2d 156 (1979); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399, 79 S.Ct. 1237, 1240-1241, 3 L.Ed.2d 1323 (1959). To decide whether the Arizona district court abused its discretion, we must consider its decision in light of the California district court's prior determination, after remand from the Supreme Court, that the interest in continued grand jury secrecy was slight. "[A]s the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 223, 99 S.Ct. at 1675. The California district court examined those considerations[1] and found them only minimally

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[1] The California district court relied on the five reasons for grand jury secrecy that the Supreme Court had approved in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 n.6, 78 S.Ct. 983, 986 n.6, 2 L.Ed.2d 1077 (1958), and reaffirmed in *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 219 n.10, 99 S.Ct. at 1673, n.10. These are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures

implicated here.[2] Given that determination, we cannot say that it was an abuse of discretion for the Arizona court to find that Petrol Stops's need for disclosure of the contested transcripts and documents outweighed the need for continued grand jury secrecy. Nor did the court abuse its discretion in determining that Petrol Stops had shown a compelling and particularized need to use the transcripts and documents to impeach, refresh recollections, and test credibility.

III.

Appellants Clark and Martin contend that the Arizona district court erred in denying their request for intervention as of right. They also assert that grand jury witnesses are entitled to notice and an opportunity to be heard in response to a petition to disclose their testimony to civil plaintiffs.

[3] The latter assertion, though novel, is not without merit. Under different circumstances we might find it compelling.[3] Here, however, Clark and Martin *did* have notice of Petrol

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by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial when there was no probability of guilt.

[2] The California district court noted that the first three reasons for grand jury secrecy were "of no pertinence whatsoever" in the instant case, since the grand jury was no longer in session and the criminal proceedings had terminated. The weight of the fourth factor — encouraging untrammeled disclosure — was sharply reduced by the fact that the transcripts Petrol Stops sought had already been released to Douglas and Phillips, so that disclosure to Petrol Stops would create no additional risk of reprisal by Douglas and Phillips against employees who had testified. The relevance of the fifth factor was greatly diminished because Douglas and Phillips had pleaded *nolo contendere*.

[3] We note that the Eighth Circuit approved a district court's order that provided that witnesses whose transcribed grand jury testimony was to be disclosed would be notified of that fact and given an opportunity, should they so desire, to read the portions of their testimony that were to be disclosed. *In re Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281 (8th Cir. 1978).

Stops's petition and filed objections to it prior to the March 31 hearing before the Arizona district court. Hence the question of their right to notice is irrelevant to the issues on this appeal. As for appellants' claim of a right to be heard, we believe this is properly evaluated by applying the standards for intervention as of right under Fed.R.Civ.P. 24(a)(2).[4]

[4, 5] Denial of a motion to intervene as of right is an appealable final order. *Blake* v. *Pallan*, 554 F.2d 947, 951 n.5 (9th Cir. 1977). A motion to intervene meets the requirements of Fed.R.Civ.P. 24(a)(2) for intervention as of right if: (1) the motion is timely; (2) the movant asserts an interest relating to the property or transaction that is the subject of the action; (3) without intervention the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that interest is inadequately represented by the other parties. *County of Fresno* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). In its April 23, 1980 order the Arizona district court based its denial of Clark and Martin's motion on untimeliness and on the fact that "[t]he arguments available to Petitioner Clark have already been thoroughly and capably presented by Defendants Phillips and/or Douglas."

[6-8]. We will overturn a district court ruling that an intervention motion is untimely only if the court abused its discretion. *NAACP* v. *New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973). There was no abuse of discretion here. We have previously stated that the factors usually weighed in determining timeliness are the stage of the proceedings, the reasons for and length of the delay, and the prejudice to

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[4] Fed.R.Civ.P. 24(a)(2) provides:

Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

other parties if intervention is permitted. *Alaniz* v. *Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied sub nom. Beaver* v. *Alaniz*, 439 U.S. 837, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978). Here, the district court found that Martin was aware by March 7, 1978 that Petrol Stops sought his grand jury testimony.[5] Yet Martin and Clark's counsel first expressed a desire to be heard on behalf of his clients on March 27, 1980. In its supplemental memorandum filed after rehearing the motion to intervene, the court further noted that before entering a nolo contendere plea in the criminal proceeding in December 1975, Douglas had requested transcripts of all testimony by its employees, and that Petrol Stops had filed its original petition for the grand jury testimony in December 1976. In light of this chronology, we cannot find that the Arizona district court abused its discretion in denying the motion to intervene as untimely.

Moreover, the district court also considered the extent to which permitting intervention would prejudice Petrol Stops — perhaps the most important factor in determining the timeliness of a motion to intervene as of right. *McDonald* v. *E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). In its supplemental memorandum the court summarized the effect of the proposed intervention on Petrol Stops:

> The proposed intervenors first appeared in this case years after plaintiff's original petition for the grand jury transcripts, one working day before a hearing which may have yielded plaintiff's long sought remedy, and with pleadings arguing that all, not simply Martin and Clark's grand jury testimony, should not be turned over to plaintiff.

The court concluded that Petrol Stops "would be greatly and unjustly prejudiced by the arrival of intervenors at this late stage

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[5] The district court was unable to determine when Clark first became aware that his testimony was sought. The burden is on Clark, however, to demonstrate that the conditions for intervention, including timeliness, were satisfied. *United States Postal Service* v. *Brennan*, 579 F.2d 188, 191 (2nd Cir. 1978).

of the proceedings." Thus the crucial prejudice factor, as well as considerations of chronology, supports the court's finding that the intervention motion was untimely.

IV.

Appellants Douglas and Conoco challenge the district court's attempt to modify its order of April 3, 1980 by providing, in a minute order dated October 20, 1980, that Petrol Stops "be granted leave to examine such Grand Jury documents, . . . and copy such documents as [it] may find material for the trial of this case." The April 3 order, from which appeals Nos. 5320 and 5321 were taken, provided that "no transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part."

[9] Appellants filed their notice of appeal on April 30, 1980. This step transferred jurisdiction over any matters involved in the appeal from the district court to this court. *G & M Inc.* v. *Newbern*, 488 F.2d 742, 746 (9th Cir. 1973). Even if the district court's October 20 minute order may be characterized as mere correction of a "clerical mistake" or "oversight" pursuant to Fed.R.Civ.P. 60(a), the district court was without power to issue that order without obtaining leave of this court. *Huey* v. *Teledyne, Inc.*, 608 F.2d 1234, 1237 (9th Cir. 1979).

Accordingly, we vacate the October 20, 1980 minute order. On remand, the district court will have jurisdiction properly to amend its April 3 order should it determine that modification is appropriate.

The minute order of October 20, 1980 is vacated. The April 3, 1980 order granting Petrol Stops access to the documents at issue is affirmed, as is the denial of appellants Clark and Martin's motion to intervene. The case is remanded for further proceedings in conformity with this opinion.

APPENDIX B

Order of Ninth Circuit Court of Appeals Denying Petitions for Rehearing of Appellants George Edward Clark and William L. Martin, II.

UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

NOS. 80-5321, 80-5320, 80-5470

D.C. # 73-212JAW

PETROL STOPS NORTHWEST,

Appellee.

v.

CONTINENTAL OIL COMPANY, AND
DOUGLAS OIL COMPANY OF CALIFORNIA

Appellants.

and

GEORGE EDWARD CLARK AND WILLIAM L. MARTIN, II.

Appellants and Applicants for Intervention.

ORDER

BEFORE: PREGERSON and ALARCON, Circuit Judges, and SMITH* , District Judge.

The petitions for rehearing of appellants George Edward Clark and William L. Martin are denied.

Judge Alarcon would have granted the petition.

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* The Honorable Russell E. Smith, Senior District Judge for the District of Montana, sitting by designation.

APPENDIX C

Trial Court's Findings of Fact, Conclusions of Law and Order entered April 3, 1980, Granting Plaintiff Access to the Grand Jury Transcripts and Documents.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
NO. CIV. 73-212 TUC. (JAW)

PETROL STOPS NORTHWEST,

Plaintiff.

VS.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Plaintiff Petrol Stops Northwest's petition for discovery of grand jury materials came on for hearing in this Court and cause on March 31, 1980. The court, having heard oral argument, and having read and considered all memoranda submitted by the parties and transcripts of testimony given by employees of Defendants Phillips and Douglas before a grand jury sitting in the United States District Court for the Central District of California, makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Douglas and Phillips were co-defendants in a criminal action, Criminal Docket No. 75-377, filed in the United States District Court for the Central District of California, accused, among other things, of conspiring to fix the price of rebrand gasoline.

2. Douglas and Phillips entered pleas of *nolo contendere* on December 3, 1975, to the above-mentioned indictment.

3. Certain employees and former employees of Douglas and Phillips appeared as witnesses before the grand jury which returned the above-mentioned indictment.

4. The court has studied *in camera* each of the transcripts of testimony given by employees and former employees of Douglas and Phillips in response to subpoenas issued by the grand jury in connection with the above-mentioned indictment. Some of each testimony is supportive of the above-mentioned indictment.

5. The scope of plaintiff's action includes claims of loss and damage caused, in part, by an alleged conspiracy, to which Phillips and Douglas are alleged to have been parties, to fix the price of rebrand gasoline. See *Douglas Oil Co.* v. *Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667, 1671 fn. 7 (1979); Complaint, ¶¶ 16(K) and 16(O).

6. There are portions of these transcripts which could be used by plaintiff to impeach, refresh the recollection, or test the credibility of witnesses, employees of Douglas or Phillips, who testified before the grand jury.

7. Some interrogatory and deposition answers of Lionel J. Janecek, Secretary and Director of Planning for Douglas and the corporate officer designated to respond to plaintiff's inquiries on behalf of Douglas, appear inconsistent with materials studied *in camera*.

8. The transcripts of testimony given by Phillips employees could effectively be used to refresh the recollection of such employees.

9. It would be impossible for the contested materials accumulated by the grand jury to be used effectively for impeachment, refreshment of recollection, or testing witness credibility, unless plaintiff's counsel had access to these materials for a substantial period of time.

10. Plaintiff has thus far had no access to any of the materials and testimony accumulated by the grand jury which indicted Douglas and Phillips, *et al.*

11. Defendants Douglas and Phillips have had access to the transcripts and to information contained within the transcripts

for a significant period of time. Phillips had the transcripts of its employee grand jury witnesses available for approximately four years. Counsel for Douglas, at oral argument, informed the court that the transcripts were avilable to Douglas for a substantial period of time and indicated he had received information from the "debriefing" of witnesses who were Douglas employees.

12. The value of the transcripts to impeach, refresh the recollection, or test the credibility of witness-employees of Defendants Douglas and Phillips is significantly enhanced by access to documents the grand jury acquired under subpoena from Douglas and Phillips.

CONCLUSIONS OF LAW

1. The court is in agreement with Judge Gray's evaluation of the need for secrecy of the grand jury testimony of the Phillips and Douglas employees as outlined in his Miscellaneous Order No. 5706, page 2, filed February 6, 1980, in the United States District Court for the Central District of California.

2. Plaintiff has shown a compelling and particularized need to use the grand jury transcripts and documents to impeach, refresh the recollection, and test the credibility of Douglas and Phillips employees who were witnesses before the grand jury. *Petrol Stops Northwest* v. *United States*, 571 F.2d 1127, 1130-31 (9 Cir. 1978). See *Douglas Oil Co.* v. *Petrol Stops Northwest*, ... U.S. ...., 99 S. Ct. 1667, 1675 (1979).

3. The materials and testimony accumulated by the grand jury in its investigation are within the scope of relevant materials for discovery in this action.

4. The interests of fairness to plaintiff in this civil litigation, and of effective enforcement of this nation's antitrust statutes, require that plaintiff be given access to the testimony before the grand jury by employees of defendants and to the documents furnished by defendants for the use of the grand jury. *Hawaii* v. *Standard Oil of California*, 405 U.S. 251, 262 (1972).

5. The strong interest in granting plaintiff access to these materials overcomes the lightly weighted remaining factors in favor of keeping these particular grand jury materials and documents secret. *Douglas Oil Co.* v. *Petrol Stops Northwest*, ... U.S. ...., 99 S.Ct. 1667, 1675 (1979); *Petrol Stops Northwest* v. *United States*, 571 F.2d 1127, 1130-31 (9 Cir. 1978).

ORDER

IT IS ORDERED THAT subject to the restraints provided at the conclusion of this Order:

1. The transcripts of testimony of all Douglas and Phillips employees who appeared as witnesses before the grand jury which issued indictment Criminal Docket No. 75-377, with the exception of those of George Clark and William Martin II, shall be made available to counsel for plaintiff fifteen (15) days after the date of entry of this Order;

2. The transcripts of testimony given by George Clark and William Martin II shall be made available to counsel for plaintiff sixty (60) days after the date of entry of this Order; and

3. The Clerk of this Court shall immediately request District Judge William P. Gray of the United States District Court for the Central District of California to order that the United States Department of Justice, Antitrust Division (Los Angeles Office), forward all documents accumulated by the above-mentioned grand jury by means of subpoenas served on Douglas and Phillips, to the United States District Court sitting in Tucson, Arizona.

PROVIDED, that only plaintiff's counsel shall have the right to inspect the transcripts and documents referred to in this petition; and that the information contained therein be used solely for the purpose of prosecuting this civil action, and that the use of information contained in these materials shall be limited to the purposes of impeaching, refreshing the recollection, or testing the credibility of a witness either at deposition or at trial; and

PROVIDED FURTHER, that no transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

Copies of this Order shall issue forthwith to all counsel of record and to:

Barbara Reeves
Antitrust Division
Department of Justice
300 North Los Angeles Street, Room 3101
Los Angeles, California

and

Stuart Jasper
Smaltz & Neelley
P. O. Box 2158, Terminal Annex
Los Angeles, California 90051

DATED: April 3, 1980.

JAMES A. WALSH
Senior United States
District Judge

APPENDIX D

Trial Court's Findings of Facts, Conclusions of Law and Order entered April 23, 1980 Denying Intervention to Clark and Martin.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CIV. 73-212 TUC. (JAW)

PETROL STOPS NORTHWEST,

Plaintiff.

VS.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Petitioners' motion to intervene for limited purposes during the course of these proceedings came on for hearing in this Court and cause on April 21, 1980. The court, having heard oral argument, and having read and considered all memoranda submitted by parties and petitioners, makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On December 1, 1976, plaintiff initiated Miscellaneous #5706 in the United States District Court in the Central District of California for the purpose of gaining access to testimony of Phillips and Douglas employees before the grand jury which returned Indictment No. 75-377, in the Central District of California, against Phillips, Douglas, and others.

2. The grand jury testimony of William Martin II, a former executive of Douglas, and George Clark, a former vice-president of Douglas, is included among the materials sought by plaintiff.

3. William Martin II and his attorney Donald Smaltz first became aware that plaintiff sought Martin's grand jury testimony no later than March 7, 1978.

4. The United States Court of Appeals for the Ninth Circuit decided an appeal of United States District Judge Gray's order in Misc. #5706 on March 20, 1978. See *Petrol Stops Northwest* v. *United States*, 571 F.2d 1127 (9 Cir. 1978).

5. The decisions of Judge Gray and the Court of Appeals were reversed and remanded by the United States Supreme Court on April 18, 1979, in *Douglas Oil Co.* v. *Petrol Stops Northwest*, ... U. S. ....., 99 S.Ct. 1667 (1979).

6. Pursuant to the mandate of the United States Supreme Court in *Douglas Oil Co.* v. *Petrol Stops Northwest*, ...U. S. ....., 99 S.Ct. 1667 (1979), and Judge Gray's written evaluation of February 6, 1980, in Misc. #5706, plaintiff filed a petition for disclosure of grand jury materials in this Court on February 11, 1980.

7. Counsel for would-be intervenors Martin and Clark indicated his desire to file papers and be heard in their behalf for the first time via telephone conversation with a law clerk on March 2, 1980, and in writing by a lodged memorandum in opposition to plaintiff's petition on March 28, 1980.

8. Plaintiff's petition came on for hearing on March 31, 1980. Immediately preceding this hearing, the court ruled orally that counsel for Martin and Clark would not be heard until proper procedures for intervention were followed. See *Spangler* v. *Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9 Cir. 1977).

9. Martin and Clark lodged a motion to intervene pursuant to Federal Rule 24 of Civil Procedure for the first time on April 10, 1980.

10. The Court is unable to determine when petitioner Clark first became aware that his testimony before the grand jury was being sought by plaintiff.

11. Attorneys fees for the representation of Martin and Clark are being paid in full by Defendant Douglas.

12. The moving papers of petitioners, and incorporated materials lodged with the Clerk of this Court, ask that all testimony of grand jury witnesses, not just the testimony of Martin and Clark, remain inaccessible to plaintiff's counsel.

13. Corporate Defendants Phillips and Douglas have vigorously opposed any access to the grand jury materials by plaintiff.

14. Petitioner Clark in his moving papers establishes no basis to believe that all arguments furthering his interests in this litigation have not been diligently presented to the courts by Phillips and Douglas.

CONCLUSIONS OF LAW

1. Motion for leave to intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure should be granted only if (1) timely filed, (2) the would be intervenor(s) possess an endangered interest in the subject matter of the ongoing litigation, and (3) petitioners establish that this interest is inadequately represented by existing parties. *Blake* v. *Pallan*, 554 F.2d 947, 951 (9 Cir. 1977).

2. It is the burden of petitioners seeking leave to intervene to establish that this case is fit for the proposed intervention. Id. at 954; *United States Postal Service* v. *Brennan*, 579 F.2d 188, 190 (2 Cir. 1978).

3. A motion to intervene is not timely where it evidences a lack of diligent action on the part of petitioners, or where the existing parties will be greatly and unjustly prejudiced by the arrival of intervenors at a late stage in the proceedings. *Alaniz* v. *Tillie Lewis Foods*, 572 F.2d 657, 659 (9 Cir. 1978).

4. The motion to intervene lodged by petitioner Martin is untimely filed.

5. The court is unable to rule that petitioner Clark has met his burden of establishing that his petition is timely filed.

6. The arguments available to Petitioner Clark have already been thoroughly and capably presented by Defendants Phillips and/or Douglas. *Blake*, supra, at 955.

ORDER

Petitioners' motion to intervene is DENIED.

DATED: April 23, 1980.

JAMES A. WALSH
Senior United States District Judge

APPENDIX E

Modification of Order entered May 21, 1980, Signed by Judge Walsh.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. Civ. 73-212 Tuc. (JAW)

PETROL STOPS NORTHWEST,

Plaintiff,

vs.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

MODIFICATION OF ORDER

Having considered the oral motion of plaintiff for modification of this court's April 3, 1980 Order and the memoranda of counsel for Phillips and Douglas in opposition to that motion,

IT IS ORDERED that this court's Order of April 3, 1980, be amended to add the following:

1. The clerk of this Court is hereby ordered to produce one copy of all grand jury transcripts made available to plaintiff by the terms of Orders of this court on April 3, 1980 and May 8, 1980.

2. Plaintiff shall receive these copies on May 27, 1980, and shall return these copies by placing them in the mail, (or some other suitable means of delivery), to the clerk of this Court, by June 26, 1980.

3. Following plaintiff's inspection of the transcripts, the court shall entertain a motion and memorandum from the plaintiff applying for leave to resume possession of specified transcripts, or portions of transcripts. This motion will not be the subject of oral argument.

4. Each transcript, or portion of transcript, copied for plaintiff's possession following the disposition of this application will be provided in identical form and extent for the possession of

defendants Douglas and Phillips. All parties shall return all copies as already provided in the Order of April 3, 1980.

5. While in possession of any copy of the transcripts at issue, each party shall secure the copy in a locked container within the law office of counsel.

DATED: May 21, 1980.

JAMES A. WALSH
Senior United States District Judge

APPENDIX F

Trial Court's Memorandum and Additional Findings of Fact and Conclusions of Law, entered June 4, 1980.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. Civ. 73-212 Tuc. (JAW)

PETROL STOPS NORTHWEST,

Plaintiff.

vs.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

MEMORANDUM AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

It would be helpful to recite the facts which brought this case to its present procedural posture.

Plaintiff Petrol Stops Northwest filed this civil antitrust action against twelve oil companies including Douglas Oil and Phillips Petroleum in December 1973. On March 19, 1975, a grand jury empanelled in the Central District of California returned an indictment charging several oil companies, including Douglas and Phillips, with conspiring to fix the price of rebrand gasoline. The grand jury had heard testimony of a number of Phillips and Douglas employees and former employees including William Martin II and George Clark. Both Phillips and Douglas moved, pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure (FRCrP), for all transcripts of testimony presented to the grand jury by their employees and former employees. This motion was granted and the transcripts thus obtained by Douglas and Phillips were shared with each other and possibly with other codefendants in the criminal action. By December of 1975, all codefendants in the criminal case had pleaded *nolo contendere* and were fined $50,000 each.

On December 1, 1976, plaintiff filed Miscellaneous #5706 in the United States District Court in Los Angeles for the purpose of gaining access to the materials disclosed to defendants pursuant to FRCrP 16(a)(1)(A), for use in its civil action. In May 1977, Judge Gray granted plaintiff's petition conditioned upon its abiding by a protective order. This decision was affirmed in *Petrol Stops Northwest* v. *United States*, 571 F.2d 1127 (1978), but reversed and remanded by the Supreme Court in April 1979. *Douglas Oil Co.* v. *Petrol Stops Northwest*, ... U.S. ...., 99 S. Ct. 1667 (1979). Pursuant to the directions provided by the Supreme Court majority opinion, Judge Gray held a hearing and issued a written evaluation on the need for continued grand jury secrecy, entered February 6, 1980. Consistent with the mandate of the Supreme Court opinion, plaintiff on February 11, 1980, petitioned this court for a determination of relevance of the contested materials, seeking a ruling that the benefits from availability of the materials for the civil action outweighed any harm from release of the traditionally secret grand jury documents. Hearing on this petition was once postponed and reset for Monday, March 31, 1980.

On March 27, 1980, the court's law clerk received a telephone call from Stuart Jasper of the Los Angeles firm of Smaltz and Neelley. Jasper expressed his intention to file papers on behalf of grand jury witnesses Martin and Clark in opposition to plaintiff's petition, and to be heard at oral argument four days later. These papers were received Friday, March 28, 1980. Prior to oral argument on March 31, the court heard counsel and questioned Jasper regarding the proposed intervention of his clients. The court ruled that Martin and Clark would be required to follow the procedures set forth in Rule 24 of the Federal Rules of Civil Procedure (FRCP) before their opposition would be considered. Proposed intervenors then lodged a motion for leave to intervene. Following hearing on the matter, that motion was denied for reasons set forth in this court's April 23, 1980 order.

DISCUSSION

Proposed intervenors Martin and Clark cite *Legal Aid Society of Alameda County* v. *Dunlop*, ...F.2d...., slip 2735 (9 Cir. decided April 10, 1980), (*Legal Aid II*), as authority for their motion for reconsideration of the April 23, 1980 order of this court denying intervention. To the extent that they argue this court should make additional findings of fact and conclusions of law in light of *Legal Aid II*, this court agrees and makes the following amendments to the April 23 order. (See appendix).

Legal Aid II involved litigation to require certain government agencies to enforce affirmative action regulations. At several stages of the litigation the position of the agencies coincided with the interests of the would-be intervenor, Chamber of Commerce. After the government took positions contrary to those of the Chamber on an appeal and a critical discovery matter, the Court of Appeals appeared inclined to allow the Chamber to assume the adversary role formerly discharged by the government. *Id.* at 2737. The case was remanded to the trial court for further considerations.

It may be helpful to consider some propositions which remain unchanged after *Legal Aid II*. First, nothing in FRCP 24 indicates parties are free to avoid or delay the effects of unfavorable rulings made after thoroughly argued adversary proceedings by sponsoring closely allied interests to move for intervention. In *Legal Aid II* it was clear that the government agencies had not provided the impetus for the Chamber's proposed intervention. In *Legal Aid II* it was clear that the government agencies had not provided the impetus for the Chamber's proposed intervention. A second undisturbed proposition is that intervenors normally may not relitigate issues decided after truly adversary proceedings. *Petition of Geisser*, 554 F.2d 698, 705 n.6 (5 Cir. 1977). (Of course, the Chamber in *Legal Aid II* moved to step into remaining battles in place of the party which formerly had acted in its interest.)

In our case, *Petrol Stops*, the nexus between Douglas and the proposed intervenors is so close that there is reason to question the good faith presumed of all defendants. Legal expenses for the proposed intervenors are being paid in full by defendant Douglas even though Clark did not request Douglas to pay his legal fees. (Clark depo. pp. 71-72). The proposed intervenors share the same local counsel with defendant Douglas. Indeed, counsel for Douglas at oral argument has spoken in "we" terms when referring to the interests of the proposed intervenors and Douglas.[1] The proposed intervenors first appeared in this case years after plaintiff's original petition for the grand jury transcripts, one working day before a hearing which may have yielded plaintiff's long sought remedy, and with pleadings arguing that all, not simply Martin and Clark's grand jury testimony, should not be turned over to plaintiff. The impetus for Clark to seek counsel in this matter was provided by Max Gillam of the firm of Latham & Watkins which represented Douglas on appeal of Judge Gray's 1977 order.[2] Clark depo. pp. 10, 49 of March 31, 1980 hearing on petition by plaintiff; see *Petrol Stops Northwest* v. *United States*, 571 F.2d 1127, 1128 (9 Cir. 1978) and *Douglas Oil Co.* v. *Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667, 1669 (1979). The extremely close nexus between Douglas and the proposed intervenors is sufficient to distinguish *Petrol Stops* from *Legal Aid II*.

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[1] "And your Honor's ruling denies an intervention at this point simply on some procedural grounds of timeliness and on some conclusion of your Honor that Conoco was in effect making all the arguments they could have made. We would respectfully, on appeal, disagree with both of those points." Oral argument of counsel for Douglas and Conoco Tom Burton at hearing (on motion to stay this court's April 3 order) on May 8, 1980.

[2] Gillam also appears to represent Conoco-Douglas in MDL 150 where counsel is arguing to prevent disclosure of the identical transcripts at issue here to plaintiffs-states in that case. Pp. 16, 50 of March 31, 1980 hearing.

In an attempt to make Martin's position similar to that of the Chamber in *Legal Aid II* counsel for would-be intervenors claims that a statement[3] in Douglas' filings of March 3, 1980 acts against the best interest of Martin. The court disagrees. The effect of this remark in context is to concede nothing while arguing that defendant Douglas' "prematurity" argument is particularly strong where plaintiff seeks grand jury testimony of witnesses who had not yet had their depositions taken in this civil action. Counsel for would-be intervenors made the same argument in supporting papers lodged March 28, 1980, at pp. 14 and 16. Carrying counsel's most recent argument to its logical conclusion, perhaps he is incapable of representing both Clark, (whose deposition is not specifically mentioned in plaintiff's February 13, 1980 memorandum), and Martin, (whose deposition is specifically mentioned by plaintiff), without conflict. But this diversion into hypothetical ethical conflicts of counsel should not divert our attention from the major premise — that the interests of Douglas and the proposed intervenors are so close as to *de facto* permit joint representation.[4]

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[3] "Petrol Stops has asked carte blanche for all transcripts of all employees or former employees of both Douglas and Phillips Petroleum Company and all documents produced by those two companies to the grand jury. There is no showing that all such documents would conceivably be required for the limited purposes which Petrol Stops advances as particular need for such disclosure. The only arguably usable portions of the transcripts could be those of William Martin II and George Hopwood, Douglas employees to whom Petrol Stops directly refers."

[4] If there were any acts taken by Douglas which were not in the interests of the proposed intervenors they occurred before plaintiff's original petition when Douglas moved for transcripts of proposed intervenors' testimony pursuant to Federal Rule 16(a)(1)(A) of Criminal Procedure. After receiving copies of the transcripts, Douglas shared them with co-defendant(s) in the criminal case. These acts were done before the plea of *nolo contendere* in 1975. P. 49 of March 31, 1980 hearing. See Brief for the United States (pp. 16-17 n. 9) filed in the Supreme Court in this action, and State of *Illinois* v. *Sarbough*, 552 F.2d 768, 775 (7 Cir. 1977).

Proposed intervenors argue they bring a novel and heretofore unrepresented prospective to this case. The newness of their arguments is grossly overstated; in fact, it is incorrect. For example, Martin and Clark's memorandum (at 14) in support of their motion for rehearing states: " . . . the United States Government has not furnished the Court with its arguments respecting the need for protection of grand jury secrecy today as a means of encouraging free and untrammeled disclosure by grand jury witnesses in the future. This is an argument which Martin and Clark make in their opposition papers. It is not an argument presented by Phillips or Douglas."

The Department of Justice has provided its opinion on the question of disclosure of these documents, and it is not helpful to the substantive position of the proposed intervenors, Douglas or Phillips. At the outset of plaintiff's petition for disclosure of these contested materials, the government offered no objection to disclosure because it felt plaintiff had met its burden of showing a particularized need, (A99).[5] The government's brief, (p. 16), in the Supreme Court expressed its opinion that the need for "free and untrammeled disclosure" by grand jury witnesses would not be harmed by disclosure of these materials since their employers had already received, seen, and apparently distributed, the contested testimony to their co-defendants in the criminal action.

The contention that neither Douglas nor Phillips has argued this "free and untrammeled disclosure" factor is factually incorrect. The arguments made at pp. 11-13 of their opening brief, and page 6 of their reply brief for the Supreme Court were reflected in the majority opinion, ... U.S. ...., 99 S.Ct. 1667, 1674-75 (1979).[6] On remand to Judge Gray, both Phillips and

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[5] (A99) is reference to the appendix page number assigned papers in this litigation in the Supreme Court file.

[6] In their reply brief for the Supreme Court, defendants went so far as to suggest that business lawyers would be inclined to encourage their witness-clients to be helpful to future grand juries in opening new avenues of inquiry only if they could confidentially advise their

Douglas dedicated substantial portions of their written opposition to plaintiff's Proposed Evaluation of Need for Grand Jury Secrecy to this issue. Indeed this entire argument is one which should have been addressed to Judge Gray.

Legal Aid II suggests the "adequacy of representation" prong of the FRCP 24(a)(2) test is met by a minimal and rather speculative showing. See slip opinion at 2737. Both of the cases cited for this proposition, *Trbovich* v. *United Mineworkers*, 404 U.S. 528, 538-39 (1972); *Johnson* v. *San Francisco Unified Schools District*, 500 F.2d 349, 352-54 (9 Cir. 1974), and *Legal Aid II* itself, involve situations wherein private organizations sought to intervene to supplement government representation which only partially spoke in the groups' perceived interests. *Trbovich* allowed a union member whose complaint initiated the entire proceeding to speak in his own behalf instead of being completely under the wing of the Secretary of Labor. 404 U.S. at 538-539. *Johnson* allowed parents of elementary school children of Chinese ancestry to intervene in a school desegregation case in part because the school district could not adequately represent their interests. 500 F.2d at 353-54. If Douglas and Phillips had not provided the adversity needed to fairly litigate questions of grand jury secrecy, proposed intervenors would be in a position where *Trbovich* and *Johnson* would clearly be in their favor. As the case stands, the interests of the proposed intervenors have been more than adequately represented. *Blake* v. *Pallan*, 554 F.2d 947, 954 (9 Cir. 1977).

CONCLUSION

If we were to assume that the Chamber in *Legal Aid II* were permitted to intervene and lost, and then financed an individual member of the Chamber to relitigate the same issues, it would be

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clients that the testimony would remain secret, (pp. 2-3). Seriously advancing this argument demonstrates how imaginative and complete defendants' counsel were on this subject.

analogous to the current position of this litigation. The proposed intervention is denied.

DATED: June 4, 1980.

JAMES A. WALSH
Senior United States District Judge

APPENDIX

The following are additions to the findings of fact made by this court in its April 22, 1980 order.

15. Donald Smaltz, counsel for proposed intervenor Martin since no later than March 7, 1978, learned of the decision of the United States Court of Appeals for the Ninth Circuit shortly after it was filed March 20, 1978, and learned of the decision of the United States Supreme court in *Douglas Oil Co.* v. *Petrol Stops Northwest*, ... U.S. ..., 99 S.Ct. 1667, (1979), shortly after it was announced on April 18, 1979. (Declaration of Donald Smaltz, executed May 1, 1980, Ex. C [p. 25] to proposed intervenors' May 5, 1980 motion for rehearing.)

16. Following the April 18, 1979 opinion of the Supreme Court it was apparent that plaintiff would pursue its petition in accordance with the mandate of the Court and that the next judicial hearing on the matter would be before the Honorable William Gray, United States District Court Judge for the Central District of California.

17. This court has never been made aware of any attempt on the part of proposed intervenors or their counsel to bring their arguments, oral or written, to the attention of Judge Gray before his written evaluation of February 6, 1980. Hence, this court finds that no such attempt was made.

18. Proposed intervenors and their counsel had no reasonable expectation that they would be served with notice of any attempt to secure their grand jury testimony by plaintiff, and have demonstrated no reason to believe they would ordinarily be served with such notice by the Department of Justice.

19. Corporate defendants Phillips and Douglas have effectively presented every argument made in the materials lodged by proposed intervenors with the single exception of arguments which might arise from "offhand derogatory comments of a personal nature about certain individuals" allegedly made by Martin in the course of his grand jury testimony.

20. Each and every argument of corporate defendants Phillips and Douglas indicates that the interests of the defendants and the proposed intervenors have *not* diverged since 1975. The interests of corporate defendants and proposed intervenors diverged in 1975 when Douglas obtained, (pursuant to Rule 16(a)(1)(A) of Criminal Procedure), a copy of the grand jury testimony of Martin and Clark and distributed it to codefendant(s) in the criminal action begun by Indictment No. 75-377 in the Central District of California. Neither Martin nor Clark have brought any objections they had at that time to the attention of this court. Hence, this court finds that Martin and Clark expressed no objections to the release of transcripts of their grand jury testimony to Douglas or codefendants allowed by Douglas to read these transcripts. See n. 4, *supra*.

21. The nexus between Douglas and proposed intervenors suggests the possibility that the defendant is attempting to relitigate a long fought legal battle by sponsoring closely allied interests to move for intervention. The court is unable to find either the truth or falsity of this possibility.

22. Plaintiff Petrol Stops Northwest has gone to great lengths to successfully litigate favorable rulings on the petition at issue. It would be seriously and unfairly prejudiced if it were forced to *de facto* relitigate the petition with proposed intervenors.

The following are additions to the conclusions of law made by this court in its April 23, 1980 order:

7. The conduct of Martin and his counsel in not making his intention to intervene known to any court prior to March 27, 1980 evidences a lack of diligence.

8. Plaintiff Petrol Stops Northwest would be greatly and unjustly prejudiced by the arrival of intervenors at this late stage of the proceedings regarding its petition to inspect transcripts of testimony taken before the grand jury.

APPENDIX G

Trial Court's Minute Order Modifying Earlier Orders.

UNITED STATES DISTRICT COURT OF APPEALS

DISTRICT OF ARIZONA

(CIVIL MINUTES — GENERAL)

Civil Case No: 73-212-Tuc. (JAW)

October 20, 1980

PETROL STOPS, N.W.

vs.

CONTINENTAL OIL CO., ET AL

PRESENT: HON. JAMES A. WALSH JUDGE

William G. Harris	Pete DiCurti
Deputy Clerk	Court Reporter
ATTORNEYS FOR PLAINTIFF(S)	*ATTORNEYS FOR DEFENDANT(S)*
Dick Casey	Harold J. Bliss, Jr.
	J. Mercer Johnson
	Michael Levy

PROCEEDINGS:

PLAINTIFF'S Motion for Clarification.

Defendant CONOCO & Douglas Motion to Compel Discovery and for an award of expenses.

ORDERED:

Order plaintiff be granted leave to examine such Grand Jury documents, consisting of approximately 18 cartons, and copy such documents as plaintiff may find material for the trial of this case.

Order deny defendant's request that plaintiff be required to furnish to the defense counsel duplicate copies of the Grand Jury documents which plaintiff's counsel copies.

Order plaintiff answer interrogatories described in the motion no later than March 1, 1981.

There will be no order on either side for attorney's fees.

Attorney .....

Court ..... Prepare & File Formal Order

APPENDIX H

Minute Order of Trial Court dated May 8, 1980 Staying Enforcement of Judgment.

DOCKET NO. 73-212

PETROL STOPS NORTHWEST,

Plaintiff,

v.

CONTINENTAL OIL CO., et al.,

Defendant.

Date	NR.	Proceedings
05/08/80	491.	MINUTE ENTRY (JAW) Carol Post — Ct. Rptr. R. Casey appears for Pltf. S. Jasper, T. Burton, J. Johnson appear for Defts. ORDER Conoco & Douglas' Mot. for Stay of Enforcement of Judgment pending appeal and for approval of Supersedeas Bond granted with bond setting the sum of $2,500.00. ORDER that until counsel for MARTIN & CLARK are granted intervention in this case, their motion for Protective Order will not be heard.

APPENDIX I

Order on Motion for Stay of Judgment Pending Appeal and For Approval of Supersedeas Bond dated May 13, 1980.

CONOCO, INC.
TOM BURTON
J. STEPHEN KING
P. O. Box 2197
Houston, Texas 77001
Telephone: (713) 965-1030
JOHNSON, DOWDALL & TERRY
J. MERCER JOHNSON
250 North Church Avenue
Tucson, Arizona 85701
Telephone: (602) 624-8741
Attorneys for Real Parties In Interest,
Douglas Oil Company and Conoco, Inc.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NOS. 73-212 TUC-JAW
MISC. 5706

PETROL STOPS NORTHWEST,

Plaintiff,

vs.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

PETROL STOPS NORTHWEST, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,

Real Parties In Interest.

ORDER

ORDER ON MOTION FOR STAY OF JUDGMENT PENDING APPEAL AND FOR APPROVAL OF SUPERSEDEAS BOND

The motion by Real Parties in Interest Douglas Oil Company and Conoco, Inc., for stay of judgment pending appeal and for approval of supersedeas bond having come on for hearing before this Court, and good cause having been shown,

IT IS HEREBY ORDERED as follows:

1. Enforcement of the judgment and order dated April 3, 1980, insofar as the same relates to the release of the grand jury transcripts of George Edward Clark and William L. Martin, II, in this action is hereby stayed pending disposition of the appeal of said judgment and order to the United States Court of Appeals for the Ninth Circuit, and pending further order of this Court.

2. Supersedeas bond in the amount of $2,500.00 is hereby approved, said bond to be filed with the Court no later than the 18th day of May, 1980.

DATED this 13th day of May, 1980.

JAMES A. WALSH
United States District Judge

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Pima County; I am over the age of eighteen years and not a party to the within entitled action. I certify I am employed by the firm of Johnson, Dowdall & Terry, members of the Bar of this Court in good standing at whose direction the service was made; my business address is 250 North Church Avenue, Tucson, Arizona 85701.

On May 13, 1980 I served the within

ORDER

on the parties in said action, by placing a true copy thereof in the United States mail at Tucson, Arizona, in a sealed envelope (sealed envelopes) with postage thereon fully prepaid and addressed as follows:

(See attached service list)

Executed at Tucson, Arizona, on the date hereinabove set forth in this Certificate.

I certify under penalty of perjury that the foregoing is true and correct.

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Berman & Giauque
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APPENDIX J

Order on Motion for Stay of Mandate Filed September 8, 1981, United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-5321
80-5320
80-5470

DC CV 73-0212 JAW

PETROL STOPS NORTHWEST,

Plaintiff/Appellee,

vs.

CONTINENTAL OIL COMPANY and
DOUGLAS OIL COMPANY OF CALIFORNIA,

Defendants/Appellants,

and

GEORGE EDWARD CLARK and WILLIAM L. MARTIN II

Applicants For Intervention.

ORDER ON MOTION FOR STAY OF MANDATE

(Rule 41 (b) Fed.R.App.P.)

Upon due consideration of appellants motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before September 13, 1981,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

HARRY PREGERSON
United States Circuit Judge

---

* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

CA9-003 (12/3/79)

APPENDIX K

Order of the Ninth Circuit Court of Appeals Extending the Stay of Mandate until October 11, 1981.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5320 and 80-5470

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

vs.

CONTINENTAL OIL COMPANY and DOUGLAS OIL COMPANY OF CALIFORNIA,
Defendants-Appellants,

and

GEORGE EDWARD CLARK and WILLIAM L. MARTIN, II,
Applications for Intervention.

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

vs.

CONTINENTAL OIL COMPANY and DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Defendants,

and

GEORGE EDWARD CLARK and WILLIAM L. MARTIN, II
Appellants and Applicants for Intervention.

ORDER

Appellants Douglas Oil Company of California and Continental Oil Company, and appellants for intervention William L. Martin, II, and George Edward Clark's joint motion for extension of stay of mandate to and including October 11, 1981 is GRANTED.

/s/ HARRY PREGERSON
HARRY PREGERSON
United States Circuit Judge

APPENDIX L

Fifth Amendment to the Constitution.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX M

Rule 6 of the Federal Rules of Criminal Procedure.

Rule 6. The Grand Jury

(a) Summoning grand juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to grand jury and to grand jurors.

(1) *Challenges.* The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion to dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 USC §187(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) **Foreman and deputy foreman.** The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be

made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who may be present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Secrecy of proceedings and disclosure.

(1) General rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An

attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) Sealed indictments. The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) Finding and return of indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

(g) Discharge and excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

(Dec. 26, 1944, eff. Mar. 21, 1946, as amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 26, 1976, eff. Aug. 1, 1976 and Oct. 1. 1977; Act July 8, 1976, P.L. 94-349, §1, 90 Stat. 822; Act July 30, 1977, P.L. 95-78, §§1, 2(a), 91 Stat. 319, eff. Oct. 1, 1977.)

APPENDIX N

Rule 24 of the Federal Rules of Civil Procedure.

Rule 24.
INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a

party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

APPENDIX O

Letter from Honorable James A. Walsh, District Judge, to Counsel dated July 14, 1980.

JAMES A. WALSH
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JUDGE'S CHAMBERS
TUCSON, ARIZONA 55701

July 14, 1980

Mr. Richard W. Casey
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Salt Lake City, Utah 84101

Mr. Thomas H. Burton, Jr.
P. O. Box 2197
Houston, Texas 77001

Mr. Harold J. Bliss, Jr.
363 North First Avenue
Phoenix, Arizona 85003

Re: Civ. 73-212 Tuc., Petrol Stops Northwest
vs. Continental Oil Co., et al.

Dear Counsel:

The documents subpoenaed by the California grand jury from Douglas and Phillips and made available to plaintiff by order of April 3, 1980, have not moved from Los Angeles due to an error in shipment. My law clerk informs me that the government once indicated that defendants in the criminal case spent several weeks copying documents onto microfiche. If these documents are available on microfiche considerable expense and time may be saved by substituting the film for the actual documents in our case. I believe it would be highly desirable to do this.

Please respond in writing by July 24, 1980, regarding whether you believe this suggestion is practical and whether you object to use of such a procedure in this case.

Sincerely,

JAMES A. WALSH

cc: Mr. James A. Fein
Mr. J. Mercer Johnson
Mr. Jim Howell,
c/o Hon. William P. Gray

APPENDIX P

Petition for Production of Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena.

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Attorneys for Plaintiff

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CIV. 73-212 TUC-JAW
MISC. NO. 5706

PETROL STOPS NORTHWEST,
Plaintiff,

vs.

CONTINENTAL OIL COMPANY, et al.,
Defendants.

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties in Interest.

PETITION FOR PRODUCTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA

Petitioner Petrol Stops Northwest, plaintiff in Civil No. 73-212 TUC-JAW now pending before this Court, by and through its counsel of record, hereby moves this Court, pursuant to Rule 6(e), Federal Rules of Criminal Procedure, and pursuant to the

Evaluation of the Need for Grand Jury Secrecy and Order of the Honorable William P. Gray of the United States District Court for the Central District of California, to make available for inspection by petitioner's counsel of record all transcripts of grand jury testimony which were made available to Phillips Petroleum Co. ("Phillips") and Douglas Oil Co. ("Douglas") in *United States* v. *Phillips, et. al.*, Criminal Docket No. 75-377, filed in the United States District Court, Central District of California and to order the Chief of the Los Angeles Office of the Antitrust Division of the U.S. Department of Justice to produce all documents produced by Phillips and Douglas which were subpoenaed by the grand jury in *United States* v. *Phillips, et al., supra*. Said documents are currently believed to be in the custody of the Chief of the Los Angeles Office of the Antitrust Division pursuant to an impounding order issued by the District Court, Central District of California. This petition is made on the grounds that:

1. The District Court for the Central District of California, being the grand jury trial court, has evaluated the need for secrecy with respect to grand jury testimony and documents now being requested by petitioner and has found that disclosure, pursuant to Rule 6(e), Federal Rules of Criminal Procedure, and the directives of the Supreme Court of the United States in *Douglas Oil Co. of California* v. *Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667 (1979), will not invade the secrecy of the grand jury, and that the need, if any, for continued grand jury secrecy of these grand jury materials is lightly weighted;

2. Petitioner has a particularized need for said grand jury transcripts and documents produced pursuant to the grand jury subpoena to avoid injustice because:

(a) The criminal indictment handed down by the grand jury involves the same allegations of antitrust violations as petitioner's complaint in the instant action. Both the civil and criminal complaints also involve the same defendants

and co-conspirators, and therefore, evidence contained in the grand jury material is directly pertinent to petitioner's cause of action;

(b) Disclosure is necessary in order to show that Phillips, Douglas and their employees have perjured themselves in answer to certain interrogatories propounded to them by petitioner in the instant action, and in the depositions of several former employees; petitioner is in need of said grand jury materials in order to allow for equitable discovery in light of the fact that defendants have had ample opportunity to examine these requested materials.

3. The transcripts, documents and materials have relevance to the pending civil antitrust action and their production and disclosure will avoid injustice in this proceeding.

4. If petitioner is not allowed access to these documents, it will be severely prejudiced in this antitrust action.

5. Petitioner's request is structured to cover only material relevant to its civil cause of action and necessary to avoid injustice.

On the basis of the foregoing and the attached Memorandum of Points and Authorities, petitioner prays this Court to allow its counsel of record to examine, inspect and copy all transcripts of grand jury testimony which were made available to Phillips and Douglas in *United States* v. *Phillips, et al., supra,* and to direct the Department of Justice to produce all documents, records and files in its possession which were produced for Phillips and

Douglas pursuant to grand jury subpoena in *United States* v. *Phillips, et al., supra.*

DATED this 11 day of February, 1980.

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By RICHARD W. CASEY
Jay D. Gurmankin
by Richard W. Casey
Attorneys for Plaintiff

Supplemental Brief

Office-Supreme Court, U.S.
FILED
OCT 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-691

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CONOCO INC. (FORMERLY CONTINENTAL OIL COMPANY),
DOUGLAS OIL COMPANY OF CALIFORNIA,
GEORGE EDWARD CLARK
AND WILLIAM L. MARTIN, II,
Petitioners,

v.

PETROL STOPS NORTHWEST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENT TO APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX B -- CORRECTED

UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

NOS. 80-5321, 80-5320, 80-5470

D.C. # 73-212JAW

PETROL STOPS NORTHWEST,

Appellee,

v.

CONTINENTAL OIL COMPANY, AND
DOUGLAS OIL COMPANY OF CALIFORNIA

Appellants,

and

GEORGE EDWARD CLARK AND WILLIAM L. MARTIN, II,

Appellants and Applicants for Intervention.

O R D E R

BEFORE: PREGERSON and ALARCON, Circuit Judges, and SMITH* , District Judge.

The petitions for rehearing of appellants George Edward Clark and William L. Martin are denied.

Judge Alarcon would have granted the petition.

Filed
August 12 1981
Richard H. Deane
Clerk, U.S. Court of Appeals

---

* The Honorable Russell E. Smith, Senior District Judge for the District of Montana, sitting by designation.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER

No. 81-691

In the Supreme Court of the United States

October Term 1981

CONOCO, INC. (formerly CONTINENTAL OIL COMPANY), DOUGLAS OIL COMPANY OF CALIFORNIA, GEORGE EDWARD CLARK AND WILLIAM L. MARTIN II,

Petitioners,

v.

PETROL STOPS NORTHWEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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B. The Opinion of the United States Court of Appeals for the Ninth Circuit Correctly and Consistently Applied This Court's Decisions and Subsequent Opinions by Other Circuits Denying Intervention Where the Motion

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TABLE OF AUTHORITIES

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No. 81-691

In the Supreme Court of the United States

October Term 1981

CONOCO, INC. (formerly CONTINENTAL OIL COMPANY), DOUGLAS OIL COMPANY OF CALIFORNIA, GEORGE EDWARD CLARK AND WILLIAM L. MARTIN II,

Petitioners,

v.

PETROL STOPS NORTHWEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Petrol Stops Northwest respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari of Conoco, Inc. (hereinafter "Conoco"), Douglas Oil Company of California (hereinafter "Douglas"), George Edward Clark (hereinafter "Clark") and William L. Martin II (hereinafter "Martin"), seeking

review of the Ninth Circuit's affirmance of (1) the decision of the United States District Court for the District of Arizona, the trial court, granting Petrol Stops Northwest (hereinafter "Petrol Stops") the same right of access to grand jury materials received by Douglas and its co-defendant Phillips Petroleum Company (hereinafter "Phillips") prior to their *nolo contendere* pleas to indictments for violating the antitrust laws by engaging in the same conduct alleged by Petrol Stops in this civil antitrust action, a decision reached in scrupulous accordance with this Court's directions set forth in *Douglas Oil Company of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), requiring the balancing of Petrol Stops' particularized and compelling need for such materials against the need for continued grand jury secrecy as determined by the grand jury court; and (2) the decision of the United States District Court for the District of Arizona denying the application for intervention of individual petitioners Clark and Martin on the grounds that their application was not filed in a timely manner, that said petitioners' interests had been adequately protected by the existing parties, and that there was reason to question the petitioners' good faith.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported in 647 F.2d 1005, appears in Appendix A. The trial court's Findings of Fact, Conclusions of Law and Order, entered April 3, 1980, granting plaintiff access to the grand jury transcripts and documents appears in Appendix B. The trial court's

Findings of Fact, Conclusions of Law and Order, entered April 23, 1980, denying intervention to Messrs. Clark and Martin appears in Appendix C. The trial court's Memorandum and Additional Findings of Fact and Conclusions of Law, entered June 4, 1980, finding, in part, reason to question the presumed good faith of petitioners appears in Appendix D. The grand jury court's Evaluation of Need of Grand Jury Secrecy and Order Transmitting Grand Jury Transcripts to the U.S. District Court for the District of Arizona, dated February 2, 1980, appears in Appendix E.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit, utilizing standards announced by this Court in this very case and on this exact question, correctly affirmed the decision of the trial court, made on the basis of review of all the grand jury transcripts that where (1) the grand jury court had determined that there was only a "lightly-weighted" need for secrecy; (2) the plaintiff had demonstrated a particularized need for disclosure of grand jury materials; and (3) defendants in the civil action had already been given access to those grand jury materials and pled *nolo contendere*, those grand jury materials should be disclosed under a strict protective order to the interested parties.

2. Whether the United States Court of Appeals

for the Ninth Circuit correctly affirmed the trial court's denial of intervention where the would-be intervenors' application was untimely, where their interests had been adequately protected by the existing parties, where the existing parties would be greatly prejudiced if intervention were allowed, and where the trial court found reason to question the good faith of the would-be intervenors and defendants in the underlying action.

STATUTES

Federal Rules of Criminal Procedure, Rule 6(e), appears in Appendix F to this Brief. Federal Rules of Civil Procedure, Rule 24, appears in Appendix G to this Brief.

STATEMENT OF THE CASE

This proceeding concerns consolidated appeals stemming from efforts by Petrol Stops Northwest, a private antitrust plaintiff, to gain access to testimony and documents obtained by attorneys in the Antitrust Division, United States Department of Justice, pursuant to subpoenas served upon Douglas and Phillips during the course of a criminal antitrust case, *U.S. v. Phillips Petroleum Company, et al.*, No. 75-377 MML (C.D. Cal. 1975), and defendant Douglas' long-standing efforts to prevent and forestall such access.

The district court in California concluded that criminal case against petitioner Douglas and its co-defendant Phillips by disbanding the grand jury, accepting *nolo*

contendere pleas from Douglas and Phillips, and entering a consent decree enjoining further blatant price fixing of refined petroleum products in the Western United States. Petitioners Clark and Martin, both former employees of Douglas, were identified in the government's Bill of Particulars as co-conspirators in the alleged unlawful conspiracy, and both testified before the federal grand jury. Prior to the *nolo* pleas, Douglas and Phillips had obtained, pursuant to Federal Rules of Criminal Procedure, Rule 16(a), the grand jury transcripts and documents now sought by Petrol Stops.

A. *Petrol Stops' Original Rule 6(e) Petition.*

In December, 1976, Petrol Stops petitioned the United States District Court for the Central District of California, the grand jury court, under Rule 6(e), Federal Rules of Criminal Procedure, for disclosure of the grand jury transcripts furnished to Douglas and Phillips and the documents subpoenaed by the grand jury from those companies.[1] The district court granted Petrol Stops' petition, subject to protective conditions, and the United States Court of Appeals for the Ninth Circuit affirmed. *Petrol Stops Northwest v. U.S.*, 571 F.2d 1127 (9th Cir. 1978). This Court reversed that decision, holding that the grand jury court had erred in its decision to grant Petrol Stops access to the transcripts and documents without sufficient knowledge of Petrol Stops' need for the grand jury materials in its civil suit pending in Arizona. *Douglas Oil Company of California v. Petrol Stops*

[1] The federal government did not oppose the petition because the government agreed that Petrol Stops had made a sufficient showing of "particularized need".

Northwest, 441 U.S. 211, 228 (1979). This Court directed that, upon remand, the grand jury court should make a written evaluation of the need for continued grand jury secrecy and a preliminary determination of the appropriateness of disclosure. The grand jury materials were then to be sent to the United States District Court for the District of Arizona which was to then, in its sound discretion, make the final determination on whether to grant disclosure.

B. *Petrol Stops' Renewed Rule 6(e) Petition.*

On November 28, 1979, Petrol Stops filed with the grand jury court in California a proposed evaluation of the need for continued grand jury secrecy. In carrying out its responsibility pursuant to the mandate of this Court, the grand jury court heard argument on the issue of the need, if any, for continued grand jury secrecy. Both Douglas and Phillips vigorously opposed plaintiff-respondent's evaluation.[2] On February 6, 1980, the court entered its Evaluation of the Need for Grand Jury Secrecy and Order Transmitting Grand Jury Transcripts to the United States District Court for the District of Arizona (Appendix E). In this Evaluation, the court carefully considered each of the five traditional factors relating to grand jury secrecy, as set forth by this Court. *Douglas Oil Company, supra* at 219. The grand jury court concluded that the need, if any, for continued grand jury secrecy was "lightly weighted". The grand jury materials were then forwarded to Arizona where the trial

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[2] Douglas was joined in its efforts to oppose Petrol Stops' petition by petitioner Conoco, Inc., its parent corporation and its co-defendant.

court carefully examined the grand jury transcripts in question.

On February 13, 1980, Petrol Stops renewed its Rule 6(e) petition in the United States District Court for the District of Arizona. Again, Douglas and Phillips vigorously opposed plaintiff-respondent's petition. The matters were thoroughly briefed, and on March 31, 1980, a lengthy hearing was held before the Honorable James A. Walsh, the trial judge in the civil antitrust action. Defendants vigorously opposed the petition on the grounds that grand jury secrecy should be protected, that evidence in the criminal action was not relevant to the civil case, and that plaintiff had failed to show any "particularized need" for disclosure.

Plaintiff-respondent, on the other hand, demonstrated the specific "particularized need" which necessitated disclosure of the requested grand jury materials, and further demonstrated how that need far outweighed the minimal need for continued grand jury secrecy. For example, in answers to plaintiff's interrogatories, both Douglas and Phillips stated under oath that neither was aware of any conversation or communication with their competitors regarding the wholesale price of gasoline to independent marketers in Washington, Oregon, California or Arizona, and that it was their policy to refrain from such conversations or communications. The Bill of Particulars filed by the government in *U.S. v. Phillips, supra,* however, claimed that there had been a legion of conversations and communications concerning gasoline prices among competitors, including over 11 specific con-

versations between Douglas and Phillips. The false denials of both Douglas and Phillips lay clearly at odds with the grand jury testimony underlying the government's criminal case. Moreover, counsel for plaintiff-respondent demonstrated that the urgency of plaintiff's need for access to the grand jury materials was heightened by the development of a clear pattern of testimony from defendants' present and former employees, which directly conflicted with the Bill of Particulars. After a careful balancing analysis and after reading every transcript sought by plaintiff-respondent, the court entered an order on April 3, 1980 granting plaintiff access to the requested grand jury materials (Appendix B). In his finding, Judge Walsh held that the evidence produced in the criminal action was relevant to the civil antitrust case, and that portions of the grand jury transcripts could be used by plaintiff to impeach, refresh the recollection or test the credibility of witnesses who testified before the grand jury (Appendix B). The requested materials were only ordered disclosed under a very strict protective order limiting both their access and the purposes for which they could be used.

C. *The Last-Ditch Attempt to Intervene.*

Prior to the entry of the trial court's order, a representative of the law firm of Smaltz & Neelley appeared and attempted to be heard on the merits of plaintiff's petition as it related to two former employees of Douglas, Messrs. Clark and Martin. At this hearing, the court determined that the law firm representing Messrs. Clark and Martin was being paid by Douglas, and that counsel

for Douglas had informed counsel for the would-be intervenors that the matter was to be heard by the court. The attempt to be heard informally was denied until such time as Messrs. Clark and Martin properly sought to intervene. On April 10, 1980, a week after the trial court entered its order granting access, Messrs. Clark and Martin finally moved to intervene to oppose disclosure of the requested grand jury materials. The would-be intervenors claimed that their interests had not been adequately represented by the existing parties.

The motion to intervene was heard on April 21, 1980. Thereafter, the court entered an order denying the application for intervention, specifically holding that their interests had been thoroughly protected by the existing parties, Douglas and Phillips, and that would-be intervenors had failed to show that their motion was timely filed. In addition, the court found that allowing intervention at that late date would unduly prejudice plaintiff-respondent (Appendix C). Subsequently, Clark and Martin filed a motion for rehearing on their attempt to intervene, requesting that the court enter additional findings of fact and conclusions of law. A rehearing was, in fact, held on May 27, 1980. On June 4, 1980, the trial court refused to rescind the denial of intervention and entered its Additional Findings of Fact and Conclusions of Law. In those findings, the court found, in part, that there existed an "extremely close nexus" between Douglas and Messrs. Clark and Martin, and that it was so close that *"there is reason to question the good faith presumed of all defendants"* [emphasis added]. The court also found that the interests of Douglas and

Messrs. Clark and Martin were so close as to *de facto* permit representation and that there was a possibility that Douglas was attempting to relitigate those issues by sponsoring closely-allied interests (Appendix D).

D. *The Ninth Circuit's Opinion.*

Douglas appealed the trial court's order granting Petrol Stops access to the grand jury materials already produced to Douglas. Except for the transcripts of the testimony of Messrs. Clark and Martin, Petrol Stops has now obtained and examined the requested grand jury transcripts. Messrs. Clark and Martin appealed the court's decision to deny them intervention and their appeals were consolidated with the appeal of Douglas. The Ninth Circuit held that the district courts had correctly carried out their respective responsibilities, as set forth in this Court's mandate in *Douglas Oil Company, supra,* and that the trial court had not abused its discretion in granting Petrol Stops limited access to the grand jury materials. The appeals court further ruled that the trial court's decision denying intervention could only be overturned if the court abused its discretion, citing *National Association For The Advancement of Colored People v. State of New York,* 413 U.S. 345 (1973). After carefully analyzing the standards of Rule 24(a)(2), Federal Rules of Civil Procedure, as they applied to the facts of this case, the Ninth Circuit held that the trial court had not abused its discretion in denying the motion to intervene as untimely.

REASONS FOR DENYING THE WRIT

A. *The Opinion of the United States Court of Appeals for the Ninth Circuit Correctly Applied This Court's Decisions Concerning Granting Access to Relevant Grand Jury Materials Already Produced to Opposing Parties in Civil Litigation and the Express Mandate of This Court in This Case.*

The grand jury court in the Central District of California, the trial court in the District of Arizona, and the Ninth Circuit carefully and correctly applied the law, as expressly set forth by this Court in *Douglas Oil Company v. Petrol Stops, supra,* a careful decision on this very question decided by this Court only two years ago. In carrying out the responsibilities of the grand jury court, the Honorable William P. Gray carefully evaluated the need, if any, for continued grand jury secrecy. Armed with that court's evaluation that such need was minimal, Judge Walsh of the trial court required Petrol Stops to demonstrate a particularized need for the grand jury materials. This showing encompassed the compelling necessity of fereting out the facts in the Arizona antitrust case in light of the perjurious answers to interrogatories and deposition testimony of defendants Douglas and Phillips. Such use of grand jury materials for the purpose of impeachment, refreshing recollection and testing credibility was expressly approved by this Court in this case as the classic example of particularized need. *Douglas Oil Company, supra.* Granting access to grand jury materials where the need for disclosure far outweighs any reason to continue secrecy is not only the

firmly intended doctrine of this Court, but has long been recognized in the Ninth Circuit, *U.S. Industries v. U.S. District Court*, 345 F.2d 18 (9th Cir. 1965), *cert. denied* 382 U.S. 814 (1965), and is fully consistent with the decisions of the other circuits. *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir. 1977), *cert. denied* 434 U.S. 889 (1977); *State of Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir. 1977), *cert. denied sub. nom., J. L. Simmons Co. v. Illinois*, 434 U.S. 899 (1977). There is obviously no reason for this Court to review the opinion of the Ninth Circuit which is fully consistent with the recently announced doctrine of this Court.

B. *The Opinion of the United States Court of Appeals for the Ninth Circuit Correctly and Consistently Applied This Court's Decisions and Subsequent Opinions by Other Circuits Denying Intervention Where the Motion for Intervention is Untimely Filed, Where the Would-Be Intervenors' Interests are Adequately Protected, Where the Existing Parties Would be Prejudiced, and Where the Court Has Reason to Question the Good Faith of the Would-Be Intervenors and Defendants.*

The trial court and the Ninth Circuit correctly applied the legal requirements which underlie application of Rule 24(a), Federal Rules of Civil Procedure. To meet the requirements of Rule 24(a), the motion to intervene must be timely filed and the would-be intervenors' interests must not have been adequately represented by the other parties. The trial court is endowed with considerable discretion in determining whether these standards are met. The Ninth Circuit carefully reviewed

and affirmed the trial court's specific findings that petitioners' intervention motion was not timely filed and that their interests had been adequately represented by their closely allied former employer.

The law in the Ninth Circuit, as it relates to intervention, is fully consistent with the law of the other circuits. Petitioners' arguments to the contrary are fatuous. First, petitioners' attempt to drive a wedge between the Ninth Circuit and Fifth Circuit on the analysis of timeliness is futile. The Ninth Circuit affirmed the trial court's conclusion that Petrol Stops would be severely prejudiced if intervention were permitted. The Ninth Circuit's analysis that prejudice is the most important factor in determining the timeliness issue is consistent with the Fifth Circuit's. Indeed, while petitioners attempt to concoct some purported discrepancy between these two circuits, the Court of Appeals below cited and relied on a Fifth Circuit case, *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970).

Petitioners cited *Stallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977), and *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960), as decisions which differ in law from this case. But those decisions do not depart, in law, one iota from the law of the Ninth Circuit. Rather, the facts differ. For example, the courts in those cases found no close nexus between parties and would-be intervenors which caused the courts to question good faith.

In fact, petitioners relied heavily below on the Ninth Circuit's decision in *Legal Aid Society of Alameda v.*

Dunlop, 618 F.2d 48 (9th Cir. 1980). Petitioners have cleverly eschewed any reliance on this Ninth Circuit case in their Petition for Writ of Certiorari because their reliance on *Legal Aid* belies their position that the Ninth Circuit conflicts on intervention with the Fifth and Eighth Circuits. The Ninth Circuit in *Legal Aid* relied on decisions of the Fifth and Eighth Circuits as authority. How can petitioners now argue all of a sudden that the Ninth Circuit's law differs from the law of the very circuits the Ninth Circuit follows? The error in petitioners' analysis is that *Stallworth, Kozak* and *Legal Aid* were factually distinguishable from this case.

This Court has expressly stated that the determination of whether an intervention motion is untimely lies within the sound discretion of the trial court. *NAACP v. New York*, 413 U.S. 345, 366 (1973). It is not the responsibility of this Court to review discretionary decisions based upon the specific record below, nor should this Court review the opinion of the Ninth Circuit where it is in complete accord with the decisions of the other circuits. Petitioners failed to present any arguments under the Fifth Amendment in the courts below, and having failed to preserve such argument, it is presumed waived and is not appropriate for this Court's consideration in this instance.

C. *There is No Important Question of Judicial Policy or Law Presented by the Petition for Writ of Certiorari.*

No significant question requiring this Court's attention exists. The standards and procedures for disclos-

ure of grand jury materials pursuant to the Federal Rules of Criminal Procedure, Rule 6(e), have been recently carefully stated by this Court in *Petrol Stops*. It is not the function of this Court to re-review the Ninth Circuit's review of the record on grand jury access. Nor is it this Court's responsibility to review the Ninth Circuit's affirmance of Judge Walsh's discretion in denying petitioners' motion for intervention—a motion which is found to be untimely filed, unnecessary and filed in bad faith. The Ninth Circuit has already carefully performed these appellate review functions. The law applied to the unique facts of this case by the Ninth Circuit's opinion is consistent with decisions of the other circuits and the rules of law as established by this Court.

The petitioners failed to present any arguments based upon the Fifth Amendment in the courts below . Having failed to preserve such argument, they have waived their opportunity to raise new questions concerning the right to notice or right to privacy arguments before this Court. *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1957). Moreover, the Ninth Circuit expressly recognized that the petitioners here did have notice, so no Fifth Amendment question is presented in any event. Petitioners' joint attempt once again to forestall Petrol Stops from proceeding in this matter cannot be concealed under the guise of artificial issues of law which simply do not exist.

CONCLUSION

For the foregoing reasons, respondent Petrol Stops Northwest respectfully submits that the Petition for Writ of Certiorari in this case should be denied.

DATED this 13th day of November, 1981.

Respectfully submitted,

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By .....
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APPENDIX A

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

CONTINENTAL OIL COMPANY and
Douglas Oil Company of California,
Defendants-Appellants,

and

George Edward Clark and William L.
Martin, II, Applicants for
Intervention.

PETROL STOPS NORTHWEST,
Plaintiff-Appellee,

v.

CONTINENTAL OIL COMPANY and
Douglas Oil Company of California,
et al., Defendants,

and

George Edward Clark and William L.
Martin, II, Appellants and Applicants
for Intervention.

Nos. 80-5321, 80-5320, and 80-5470.

UNITED STATES COURT OF APPEALS,
Ninth Circuit.

Argued and Submitted Jan. 13, 1981.
Decided June 12, 1981.

Rehearing Denied Aug. 12, 1981.

Stuart P. Jasper, Los Angeles, Cal., for defendants-appellants.

Smaltz & Neelley, Los Angeles, Cal., for Clark.

Thomas Burton, Houston, Tex., for Continental.

Jay D. Gurmankin, Salt Lake City, Utah, for Petrol; Richard Casey, Salt Lake City, Utah, on brief.

Appeal from the United States District Court for the District of Arizona.

Before PREGERSON and ALARCON, Circuit Judges, and SMITH*, District Judge.

PREGERSON, Circuit Judge:

These consolidated appeals stem from efforts by Petrol Stops Northwest [Petrol Stops], a private antitrust plaintiff, to gain access to testimony and documents given to a grand jury during an investigation that led to a criminal antitrust indictment against appellant Douglas Oil Company [Douglas], one of the defendants in Petrol Stops's civil suit. The matter is before us for the second time. In an earlier opinion we affirmed a district court's order granting Petrol Stops's request. *Petrol Stops Northwest v. United States*, 571 F.2d 1127 (9th Cir. 1978). The Supreme Court reversed, however, because the California district court having custody of the grand jury ma-

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* The Honorable Russell E. Smith, Senior District Judge for the District of Montana, sitting by designation.

terials had acted without drawing on the superior knowledge of the Arizona district court where the civil suit was pending. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). On remand the procedure outlined by the Supreme Court has been followed by the two district courts and has resulted in a new order by the Arizona district court granting Petrol Stops the access it seeks. Appellants appeal from this order. The individual appellants appeal also from the denial of their motion to intervene. We affirm, but vacate the Arizona district court's attempted modification of the order from which two of these appeals are taken.

I.

In December 1973, Petrol Stops filed a civil antitrust action in the District Court for the District of Arizona against twelve oil companies, including Douglas and its parent, appellant Continental Oil Company [now Conoco]. While this proceeding was in a pre-trial stage, a lengthy federal investigation in the Central District of California culminated in March 1975 in a grand jury indictment of six companies, including Douglas and the Phillips Petroleum Company [Phillips], for conspiring to fix prices. All defendants in this criminal prosecution initially pleaded not guilty but changed their pleas to *nolo contendere*. Before changing their pleas, Douglas and Phillips asked the District Court for the Central District of California for transcripts of the testimony their employees had given before the grand jury; this request was granted.

In December 1976, Petrol Stops petitioned the District Court for the Central District of California, under Fed.R.Crim.P. 6(e), for disclosure of the transcripts furnished to Douglas and Phillips and the documents subpoenaed by the grand jury from those companies. This district court granted Petrol Stops's petition, subject to protective conditions, and we affirmed. *Petrol Stops Northwest v. United States,* 571 F.2d 1127 (9th Cir. 1978).

The Supreme Court reversed, holding that the California district court had abused its discretion by evaluating Petrol Stops's need for the transcripts and documents without sufficient knowledge of the details of the civil suit pending in Arizona. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 228-29, 99 S.Ct. 1667, 1677-1678, 60 L.Ed.2d 156 (1979). The Court directed that, upon remand, the California district court should make a written evaluation of the need for continued grand jury secrecy and a preliminary determination of the appropriateness of disclosure. The materials were then to be sent to the Arizona district court, which would make the final determination on whether to grant disclosure.

That procedure has now been followed. The California district court, after a hearing, filed on February 6,1980 its preliminary determination that the need for continued grand jury secrecy should be "lightly weighted." The requested materials were then forwarded to Arizona where a hearing was held on March 31 on Petrol Stops's petition for disclosure. On April 3, 1980, the

Arizona district court granted Petrol Stops access to the requested materials, finding that portions of the transcripts could be used "to impeach, refresh the recollection, or test the credibility of witnesses, . . . who testified before the grand jury."

At the March 31 hearing, counsel for appellants Clark and Martin appeared and sought to be heard on the merits of Petrol Stops's petition. Clark and Martin were former Douglas executives whose testimony before the Central District of California grand jury was among that which Petrol Stops was seeking. The court refused to hear any arguments on their behalf until they properly sought to intervene, pursuant to Fed.R.Civ.P. 24. On April 10, 1980 (a week after Petrol Stops's disclosure petition had been granted) Clark and Martin formally moved to intervene in the action to oppose disclosure. After a hearing, on April 21, the court entered an order denying the application to intervene as untimely and because the would-be intervenors failed to show that their interests were not adequately protected by the existing parties. The court also found that intervention would "unduly prejudice" Petrol Stops. After hearing, the court reaffirmed its denial of the intervention motion and noted its suspicion that Douglas was attempting to relitigate the issues by sponsoring closely allied interests.

II.

Appellants Douglas and Conoco contend that the Arizona district court abused its discretion by ordering disclosure of the testimony of their employees. They

argue that the grand jury testimony is not relevant to the civil action, that no particularized or compelling need for the disclosure has been shown, and that it was error to grant Petrol Stops full access to all the requested materials rather than limiting access to "discrete portions" for which a "particularized need" had been shown.

[1, 2] Grants of disclosure under Fed.R.Crim.P. 6(e) are reviewed for abuse of discretion. *See Douglas Oil Co. v. Petrol Shops Northwest,* 441 U.S. 211, 228, 99 S.Ct. 1667, 1677, 60 L.Ed.2d 156 (1979); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 399, 79 S.Ct. 1237, 1240-1241, 3 L.Ed.2d 1323 (1959). To decide whether the Arizona district court abused its discretion, we must consider its decision in light of the California district court's prior determination, after remand from the Supreme Court, that the interest in continued grand jury secrecy was slight. "[A]s the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Douglas Oil Co. v. Petrol Stops Northwest, supra,* 441 U.S. at 223, 99 S.Ct. at 1675. The California district court examined those considerations[1] and found them only minimally implicated

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[1] The California district court relied on the five reasons for grand jury secrecy that the Supreme Court had approved in **United States v. Procter & Gamble Co.,** 356 U.S. 677, 681 n.6, 78 S.Ct. 983, 986 n.6, 2 L.Ed.2d 1077 (1958), and reaffirmed in **Douglas Oil Co. v. Petrol Stops Northwest, supra,** 441 U.S. at 219 n.10, 99 S.Ct. at 1673, n.10. These are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or

here.[2] Given that determination, we cannot say that it was an abuse of discretion for the Arizona court to find that Petrol Stops's need for disclosure of the contested transcripts and documents outweighed the need for continued grand jury secrecy. Nor did the court abuse its discretion in determining that Petrol Stops had shown a compelling and particularized need to use the transcripts and documents to impeach, refresh recollections, and test credibility.

III.

Appellants Clark and Martin contend that the Arizona district court erred in denying their request for intervention as of right. They also assert that grand jury witnesses are entitled to notice and an opportunity to be heard in response to a petition to disclose their testimony to civil plaintiffs.

[3] The latter assertion, though novel, is not with-

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[1] **Continued**

tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial when there was no probability of guilt.

[2] **The California district court noted that the first three reasons for grand jury secrecy were "of no pertinence whatsoever" in the instant case since the grand jury was no longer in session and the criminal proceedings had terminated. The weight of the fourth factor—encouraging untrammeled disclosure—was sharply reduced by the fact that the transcripts Petrol Stops sought had already been released to Douglas and Phillips, so that disclosure to Petrol Stops would create no additional risk of reprisal by Douglas and Phillips against employees who had testified. The relevance of the fifth factor was greatly diminished because Douglas and Phillips had pleaded nolo contendere.**

out merit. Under different circumstances we might find it compelling.[3] Here, however, Clark and Martin *did* have notice of Petrol Stops's petition and filed objections to it prior to the March 31 hearing before the Arizona district court. Hence the question of their right to notice is irrelevant to the issues on this appeal. As for appellants' claim of right to be heard, we believe this is properly evaluated by applying the standards for intervention as of right under Fed.R.Civ.P. 24(a)(2).[4]

[4, 5] Denial of a motion to intervene as of right is an appealable final order. *Blake v. Pallan*, 554 F.2d 947, 951 n.5 (9th Cir. 1977). A motion to intervene meets the requirements of Fed.R.Civ.P. 24(a)(2) for intervention as of right if: (1) the motion is timely; (2) the movant asserts an interest relating to the property or transaction that is the subject of the action; (3) without intervention the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that interest is inadequately represented by the other parties. *County of Fresno v.*

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[3] We note that the Eighth Circuit approved a district court's order that provided that witnesses whose transcribed grand jury testimony was to be disclosed would be notified of that fact and given an opportunity, should they so desire, to read the portions of their testimony that were to be disclosed. **In re Disclosure of Testimony Before the Grand Jury**, 580 F.2d 281 (8th Cir. 1978).

[4] Fed.R.Civ.P. 24(a)(2) provides:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Andrus, 622 F.2d 436, 438 (9th Cir. 1980). In its April 23, 1980 order the Arizona district court based its denial of Clark and Martin's motion on untimeliness and on the fact that "[t]he arguments available to Petitioner Clark have already been thoroughly and capably presented by Defendants Phillips and/or Douglas."

[6-8] We will overturn a district court ruling that an intervention motion is untimely only if the court abused its discretion. *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973). There was no abuse of discretion here. We have previously stated that the factors usually weighed in determining timeliness are the stage of the proceedings, the reasons for and length of the delay, and the prejudice to other parties if intervention is permitted. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied sub nom. Beaver v. Alaniz*, 439 U.S. 837, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978). Here, the district court found that Martin was aware by March 7, 1978 that Petrol Stops sought his grand jury testimony.[5] Yet Martin and Clark's counsel first expressed a desire to be heard on behalf of his clients on March 27, 1980. In its supplemental memorandum filed after rehearing the motion to intervene, the court further noted that before entering a nolo contendere plea in the criminal proceeding in December 1975, Douglas had requested transcripts of all testimony by its employees, and that Petrol

[5] The district court was unable to determine when Clark first became aware that his testimony was sought. The burden is on Clark, however, to demonstrate that the conditions for intervention, including timeliness, were satisfied. **United States Postal Service v. Brennan**, 579 F.2d 188, 191 (2nd Cir. 1978).

Stops had filed its original petition for the grand jury testimony in December 1976. In light of this chronology, we cannot find that the Arizona district court abused its discretion in denying the motion to intervene as untimely.

Moreover, the district court also considered the extent to which permitting intervention would prejudice Petrol Stops—perhaps the most important factor in determing the timeliness of a motion to intervene as of right. *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). In its supplemental memorandum the court summarized the effect of the proposed intervention on Petrol Stops:

> The proposed intervenors first appeared in this case years after plaintiff's original petition for the grand jury transcripts, one working day before a hearing which may have yielded plaintiff's long sought remedy, and with pleadings arguing that all, not simply Martin and Clark's grand jury testimony, should not be turned over to plaintiff.

The court concluded that Petrol Stops "would be greatly and unjustly prejudiced by the arrival of intervenors at this late stage of the proceedings." Thus the crucial prejudice factor, as well as considerations of chronology, supports the court's finding that the intervention motion was untimely.

IV.

Appellants Douglas and Conoco challenge the district court's attempt to modify its order of April 3, 1980 by providing, in a minute order dated October 20, 1980,

that Petrol Stops "be granted leave to examine such Grand Jury documents, . . . and copy such documents as [it] may find material for the trial of this case." The April 3 order, from which Appeals Nos. 5320 and 5321 were taken, provided that "no transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part."

[9] Appellants filed their notice of appeal on April 30, 1980. This step transferred jurisdiction over any matters involved in the appeal from the district court to this court. *G & M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir. 1973). Even if the district court's October 20 minute order may be characterized as mere correction of a "clerical mistake" or "oversight" pursuant to Fed.R. Civ.P. 60(a), the district court was without power to issue that order without obtaining leave of this court. *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1237 (9th Cir. 1979).

Accordingly, we vacate the October 20, 1980 minute order. On remand, the district court will have jurisdiction properly to amend its April 3 order should it determine that modification is appropriate.

The minute order of October 20, 1980 is vacated. The April 3, 1980 order granting Petrol Stops access to the documents at issue is affirmed, as is the denial of appellants Clark and Martin's motion to intervene. The case is remanded for further proceedings in conformity with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. Civ. 73-212 Tuc. (JAW)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PETROL STOPS NORTHWEST,

Plaintiff,

vs.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

Plaintiff Petrol Stops Northwest's petition for discovery of grand jury materials came on for hearing in this Court and cause on March 31, 1980. The court, having heard oral argument, and having read and considered all memoranda submitted by the parties and transcripts of testimony given by employees of Defendants Phillips and Douglas before a grand jury sitting in the United States District Court for the Central District of California, makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Douglas and Phillips were co-defendants in a criminal action, Criminal Docket No. 75-377, filed in

the United States District Court for the Central District of California, accused, among other things, of conspiring to fix the price of rebrand gasoline.

2. Douglas and Phillips entered pleas of *nolo contendere* on December 3, 1975, to the above-mentioned indictment.

3. Certain employees and former employees of Douglas and Phillips appeared as witnesses before the grand jury which returned the above-mentioned indictment.

4. The court has studied *in camera* each of the transcripts of testimony given by employees and former employees of Douglas and Phillips in response to subpoenas issued by the grand jury in connection with the above-mentioned indictment. Some of such testimony is supportive of the above-mentioned indictment.

5. The scope of plaintiff's action includes claims of loss and damage caused, in part, by an alleged conspiracy, to which Phillips and Douglas are alleged to have been parties, to fix the price of rebrand gasoline. See *Douglas Oil Co. v. Petrol Stops Northwest,* ..... U.S. ....., 99 S.Ct. 1667, 1671 fn. 7 (1979); Complaint, ¶¶ 16(K) and 16(O).

6. There are portions of these transcripts which could be used by plaintiff to impeach, refresh the recollection, or test the credibility of witnesses, employees of Douglas or Phillips, who testified before the grand jury.

7. Some interrogatory and deposition answers of Lionel J. Janecek, Secretary and Director of Planning for Douglas and the corporate officer designated to respond to plaintiff's inquiries on behalf of Douglas, appear inconsistent with materials studied in camera.

8. The transcripts of testimony given by Phillips employees could effectively be used to refresh the recollection of such employees.

9. It would be impossible for the contested materials accumulated by the grand jury to be used effectively for impeachment, refreshment of recollection, or testing witness credibility, unless plaintiff's counsel had access to these materials for a substantial period of time.

10. Plaintiff has thus far had no access to any of the materials and testimony accumulated by the grand jury which indicted Douglas and Phillips, *et al.*

11. Defendants Douglas and Phillips have had access to the transcripts and to information contained within the transcripts for a significant period of time. Phillips had the transcripts of its employee grand jury witnesses available for approximately four years. Counsel for Douglas, at oral argument, informed the court that the transcripts were available to Douglas for a substantial period of time and indicated he had received information from the "debriefing" of witnesses who were Douglas employees.

12. The value of the transcripts to impeach, refresh the recollection, or test the credibility of witness-

employees of Defendants Douglas and Phillips is significantly enhanced by access to documents the grand jury acquired under subpoena from Douglas and Phillips.

CONCLUSIONS OF LAW

1. The court is in agreement with Judge Gray's evaluation of the need for secrecy of the grand jury testimony of the Phillips and Douglas employees as outlined in his Miscellaneous Order No. 5706, page 2, filed February 6, 1980, in the United States District Court for the Central District of California.

2. Plaintiff has shown a compelling and particularized need to use the grand jury transcripts and documents to impeach, refresh the recollection, and test the credibility of Douglas and Phillips employees who were witnesses before the grand jury. *Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1130-31 (9 Cir. 1978). See *Douglas Oil Co. v. Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667, 1675 (1979).

3. The materials and testimony accumulated by the grand jury in its investigation are within the scope of relevant materials for discovery in this action.

4. The interests of fairness to plaintiff in this civil litigation, and of effective enforcement of this nation's antitrust statutes, require that plaintiff be given access to the testimony before the grand jury by employees of defendants and to the documents furnished by defendants for the use of the grand jury. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 262 (1972).

5. The strong interest in granting plaintiff access to these materials overcomes the lightly weighted remaining factors in favor of keeping these particular grand jury materials and documents secret. *Douglas Oil Co. v. Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667, 1675 (1979); *Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1130-31 (9 Cir. 1978).

ORDER

IT IS ORDERED that subject to the restraints provided at the conclusion of this Order:

1. The transcripts of testimony of all Douglas and Phillips employees who appeared as witnesses before the grand jury which issued indictment Criminal Docket No. 75-377, with the exception of those of George Clark and William Martin II, shall be made available to counsel for plaintiff fifteen (15) days after the date of entry of this Order;

2. The transcripts of testimony given by George Clark and William Martin II shall be made available to counsel for plaintiff sixty (60) days after the date of entry of this Order, unless further proceedings require modification of this Order; and

3. The Clerk of this Court shall immediately request District Judge William P. Gray of the United States District Court for the Central District of California to order that the United States Department of Justice, Antitrust Division (Los Angeles Office), forward all docu-

ments accumulated by the above-mentioned grand jury by means of subpoenas served on Douglas and Phillips, to the United States District Court sitting in Tucson, Arizona.

PROVIDED, that only plaintiff's counsel shall have the right to inspect the transcripts and documents referred to in this petition; and that the information contained therein be used solely for the purpose of prosecuting this civil action, and that the use of information contained in these materials shall be limited to the purposes of impeaching, refreshing the recollection, or testing the credibility of a witness either at deposition or at trial; and

PROVIDED FURTHER, that no transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

Copies of this Order shall issue forthwith to all counsel of record and to:

Barbara Reeves
Antitrust Division
Department of Justice
300 North Los Angeles Street, Room 3101
Los Angeles, California

and

Stuart Jasper
Smaltz & Neelley
P.O. Box 2158, Terminal Annex
Los Angeles, California 90051

DATED: April 3, 1980.

JAMES A. WALSH
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. Civ. 73-212 Tuc. (JAW)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PETROL STOPS NORTHWEST,

Plaintiff,

vs.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

Petitioners' motion to intervene for limited purposes during the course of these proceedings came on for hearing in this Court and cause on April 21, 1980. The court, having heard oral argument, and having read and considered all memoranda submitted by parties and petitioners, makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On December 1, 1976, plaintiff initiated Miscellaneous No. 5706 in the United States District Court

in the Central District of California for the purpose of gaining access to testimony of Phillips and Douglas employees before the grand jury which returned Indictment No. 75-377, in the Central District of California, against Phillips, Douglas, and others.

2. The grand jury testimony of William Martin II, a former executive of Douglas, and George Clark, a former vice-president of Douglas, is included among the materials sought by plaintiff.

3. William Martin II and his attorney Donald Smaltz first became aware that plaintiff sought Martin's grand jury testimony no later than March 7, 1978.

4. The United States Court of Appeals for the Ninth Circuit decided an appeal of United States District Judge Gray's order in Misc. No. 5706 on March 20, 1978. See *Petrol Stops Northwest v. United States*, 571 F.2d 1127 (9 Cir. 1978).

5. The decisions of Judge Gray and the Court of Appeals were reversed and remanded by the United States Supreme Court on April 18, 1979, in *Douglas Oil Co. v. Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667 (1979).

6. Pursuant to the mandate of the United States Supreme Court in *Douglas Oil Co. v. Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667 (1979), and Judge Gray's written evaluation of February 6, 1980, in Misc. No. 5706, plaintiff filed a petition for disclosure of grand jury materials in this Court on February 11, 1980.

7. Counsel for would-be intervenors Martin and Clark indicated his desire to file papers and be heard in their behalf for the first time via telephone conversation with a law clerk on March 27, 1980, and in writing by a lodged memorandum in opposition to plaintiff's petition on March 28, 1980.

8. Plaintiff's petition came on for hearing on March 31, 1980. Immediately preceding this hearing, the court ruled orally that counsel for Martin and Clark would not be heard until proper procedures for intervention were followed. See *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9 Cir. 1977).

9. Martin and Clark lodged a motion to intervene pursuant to Federal Rule 24 of Civil Procedure for the first time on April 10, 1980.

10. The court is unable to determine when petitioner Clark first became aware that this testimony before the grand jury was being sought by plaintiff.

11. Attorneys fees for the representation of Martin and Clark are being paid in full by Defendant Douglas.

12. The moving papers of petitioners, and incorporated materials lodged with the Clerk of this Court, ask that all testimony of grand jury witnesses, not just the testimony of Martin and Clark, remain inaccessible to plaintiff's counsel.

13. Corporate Defendants Phillips and Douglas

have vigorously opposed any access to the grand jury materials by plaintiff.

14. Petitioner Clark in his moving papers establishes no basis to believe that all arguments furthering his interests in this litigation have not been diligently presented to the courts by Phillips and Douglas.

CONCLUSIONS OF LAW

1. Motions for leave to intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure should be granted only if (1) timely filed, (2) the would be intervenor(s) possess an endangered interest in the subject matter of the on-going litigation, and (3) petitioners establish that this interest is inadequately represented by existing parties. *Blake v. Pallan,* 554 F.2d 947, 951 (9 Cir. 1977)

2. It is the burden of petitioners seeking leave to intervene to establish that this case is fit for the proposed intervention. Id. at 954; *United States Postal Service v. Brennan,* 579 F.2d 188, 190 (2 Cir. 1978).

3. A motion to intervene is not timely where it evidences a lack of diligent action on the part of petitioners, or where the existing parties will be greatly and unjustly prejudiced by the arrival of intervenors at a late stage in the proceedings. *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9 Cir. 1978).

4. The motion to intervene lodged by petitioner Martin is untimely filed.

5. The court is unable to rule that petitioner Clark has met his burden of establishing that his petition is timely filed.

6. The arguments available to Petitioner Clark have already been thoroughly and capably presented by Defendants Phillips and/or Douglas. *Blake*, supra, at 955.

Petitioners' motion to intervene is DENIED.

DATED: April 23, 1980.

JAMES A. WALSH

Senior United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. Civ. 73-212 Tuc. (JAW)

MEMORANDUM AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

PETROL STOPS NORTHWEST,

Plaintiff,

vs.

CONTINENTAL OIL COMPANY, et al.,

Defendants.

It would be helpful to recite the facts which brought this case to its present procedural posture.

Plaintiff Petrol Stops Northwest filed this civil antitrust action against twelve oil companies including Douglas Oil and Phillips Petroleum in December 1973. On March 19, 1975, a grand jury empanelled in the Central District of California returned an indictment charging several oil companies, including Douglas and Phillips, with conspiring to fix the price of rebrand gasoline. The grand jury had heard testimony of a number of Phillips and Douglas employees and former employees including

William Martin II and George Clark. Both Phillips and Douglas moved, pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure (FRCrP), for all transcripts of testimony presented to the grand jury by their employees and former employees. This motion was granted and the transcripts thus obtained by Douglas and Phillips were shared with each other and possibly with other codefendants in the criminal action. By December of 1975, all codefendants in the criminal case had pleaded *nolo contendere* and were fined $50,000 each.

On December 1, 1976, plaintiff filed Miscellaneous No. 5706 in the United States District Court in Los Angeles for the purpose of gaining access to the materials disclosed to defendants pursuant to FRCrP 16(a)(1)(A), for use in its civil action. In May 1977, Judge Gray granted plaintiff's petition conditioned upon its abiding by a protective order. This decision was affirmed in *Petrol Stops Northwest v. United States*, 571 F.2d 1127 (1978), but reversed and remanded by the Supreme Court in April 1979. *Douglas Oil Co. v. Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667 (1979). Pursuant to the directions provided by the Supreme Court majority opinion, Judge Gray held a hearing and issued a written evaluation on the need for continued grand jury secrecy, entered February 6, 1980. Consistent with the mandate of the Supreme Court opinion, plaintiff on February 11, 1980, petitioned this court for a determination of relevance of the contested materials, seeking a ruling that the benefits from availability of the materials for the civil action outweighed any harm from release

of the traditionally secret grand jury documents. Hearing on this petition was once postponed and reset for Monday, March 31, 1980.

On March 27, 1980, the court's law clerk received a telephone call from Stuart Jasper of the Los Angeles firm of Smaltz and Neelley. Jasper expressed his intention to file papers on behalf of grand jury witnesses Martin and Clark in opposition to plaintiff's petition, and to be heard at oral argument four days later. These papers were received Friday, March 28, 1980. Prior to oral argument on March 31, the court heard counsel and questioned Jasper regarding the proposed intervention of his clients. The court ruled that Martin and Clark would be required to follow the procedures set forth in Rule 24 of the Federal Rules of Civil Procedure (FRCP) before their opposition would be considered. Proposed intervenors then lodged a motion for leave to intervene. Following hearing on the matter, that motion was denied for reasons set forth in this court's April 23, 1980 order.

DISCUSSION

Proposed intervenors Martin and Clark cite *Legal Aid Society of Alameda County v. Dunlop*, ... F.2d ....., slip 2735 (9 Cir. decided April 10, 1980), (*Legal Aid II*), as authority for their motion for reconsideration of the April 23, 1980 order of this court denying intervention. To the extent that they argue this court should make additional findings of fact and conclusions of law in light of *Legal Aid II*, this court agrees and makes the following amendments to the April 23 order. (See appendix).

Legal Aid II involved litigation to require certain government agencies to enforce affirmative action regulations. At several stages of the litigation the position of the agencies coincided with the interests of the would-be intervenor, Chamber of Commerce. After the government took positions contrary to those of the Chamber on an appeal and a critical discovery matter, the Court of Appeals appeared inclined to allow the Chamber to assume the adversary role formerly discharged by the government. *Id.* at 2737. The case was remanded to the trial court for further considerations.

It may be helpful to consider some propositions which remain unchanged after *Legal Aid II*. First, nothing in FRCP 24 indicates parties are free to avoid or delay the effects of unfavorable rulings made after thoroughly argued adversary proceedings by sponsoring closely allied interests to move for intervention. In *Legal Aid II* it was clear that the government agencies had not provided the impetus for the Chamber's proposed intervention. A second undisturbed proposition is that intervenors normally may not relitigate issues decided after truly adversary proceedings. *Petition of Geisser*, 554 F.2d 698, 705 n.6 (5 Cir. 1977). (Of course, the Chamber in *Legal Aid II* moved to step into remaining battles in place of the party which formerly had acted in its interest.)

In our case, *Petrol Stops*, the nexus between Douglas and the proposed intervenors is so close that there is reason to question the good faith presumed of all defendants. Legal expenses for the proposed intervenors

are being paid in full by defendant Douglas even though Clark did not request Douglas to pay his legal fees. (Clark depo. pp. 71-72). The proposed intervenors share the same local counsel with defendant Douglas. Indeed, counsel for Douglas at oral argument has spoken in "we" terms when referring to the interests of the proposed intervenors and Douglas.[1] The proposed intervenors first appeared in this case years after plaintiff's original petition for the grand jury transcripts, one working day before a hearing which may have yielded plaintiff's long sought remedy, and with pleadings arguing that all, not simply Martin and Clark's grand jury testimony, should not be turned over to plaintiff. The impetus for Clark to seek counsel in this matter was provided by Max Gillam of the firm of Latham & Watkins which represented Douglas on appeal of Judge Gray's 1977 order.[2] Clark depo. pp. 10, 49 of March 31, 1980 hearing on petition by plaintiff; see *Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1128 (9 Cir. 1978) and *Douglas Oil Co. v. Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667, 1669 (1979). The extremely close nexus between Douglas and the proposed intervenors is sufficient to distinguish *Petrol Stops* from *Legal Aid II*.

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[1] "And your Honor's ruling denies an intervention at this point simply on some procedural grounds of timeliness and on some conclusion of your Honor that Conoco was in effect making all the arguments they could have made. We would respectfully, on appeal, disagree with both of those points." Oral argument of counsel for Douglas and Conoco Tom Burton at hearing (on motion to stay this court's April 3 order) on May 8, 1980.

[2] Gillam also appears to represent Conoco-Douglas in MDL 150 where counsel is arguing to prevent disclosure of the identical transcripts at issue here to plaintiffs-states in that case. Pp. 16, 50 of March 31, 1980 hearing.

In an attempt to make Martin's position similar to that of the Chamber in *Legal Aid II* counsel for would-be intervenors claims that a statement[3] in Douglas' filings of March 3, 1980 acts against the best interest of Martin. The court disagrees. The effect of this remark in context is to concede nothing while arguing that defendant Douglas' "prematurity" argument is particularly strong where plaintiff seeks grand jury testimony of witnesses who had not yet had their depositions taken in this civil action. Counsel for would-be intervenors made the same argument in supporting papers lodged March 28, 1980, at pp. 14 and 16. Carrying counsel's most recent argument to its logical conclusion, perhaps he is incapable of representing both Clark, (whose deposition is not specifically mentioned in plaintiff's February 13, 1980 memorandum), and Martin, (whose deposition is specifically mentioned by plaintiff), without conflict. But this diversion into hypothetical ethical conflicts of counsel should

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[3] "Petrol Stops has asked carte blanche for all transcripts of all employees or former employees of both Douglas and Phillips Petroleum Company and all documents produced by those two companies to the grand jury. There is no showing that all such documents would conceivably be required for the limited purposes which Petrol Stops advances as particular need for such disclosure. The only arguably usable portions of the transcripts could be those of William Martin II and George Hopwood, Douglas employees to whom Petrol Stops directly refers."

[4] If there were any acts taken by Douglas which were not in the interests of the proposed intervenors they occurred before plaintiff's original petition when Douglas moved for transcripts of proposed intervenors' testimony pursuant to Federal Rule 16(a)(1)(A) of Criminal Procedure. After receiving copies of the transcripts, Douglas shared them with codefendant(s) in the criminal case. These acts were done before the plea of **nolo contendere** in 1975. P. 49 of March 31, 1980 hearing. See Brief for the United States (pp. 16-17 n.9) filed in the Supreme Court in this action, and State of Illinois v. Sarbaugh, 552 F.2d 768, 775 (7 Cir. 1977).

not divert our attention from the major premise—that the interests of Douglas and the proposed intervenors are so close as to *de facto* permit joint representation.[4]

Proposed intervenors argue they bring a novel and heretofore unrepresented prospective to this case. The newness of their arguments is grossly overstated; in fact, it is incorrect. For example, Martin and Clark's memorandum (at 14) in support of their motion for rehearing states: ". . . the United States Government has not furnished the Court with its arguments respecting the need for protection of grand jury secrecy today as a means of encouraging free and untrammeled disclosure by grand jury witnesses in the future. This is an argument which Martin and Clark make in their opposition papers. It is not an argument presented by Phillips or Douglas."

The Department of Justice has provided its opinion on the question of disclosure of these documents, and it is not helpful to the substantive position of the proposed intervenors, Douglas or Phillips. At the outset of plaintiff's petition for disclosure of these contested materials, the government offered no objection to disclosure because it felt plaintiff had met its burden of showing a particularized need, (A99).[5] The government's brief, (p. 16), in the Supreme Court expressed its opinion that the need for "free and untrammeled disclosure" by grand jury witnesses would not be harmed by disclosure of these materials since their employers had already received, seen, and apparently distributed, the contested

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[5] (A99) is reference to the appendix page number assigned papers in this litigation in the Supreme Court file.

testimony to their codefendants in the criminal action.

The contention that neither Douglas nor Phillips has argued this "free and untrammeled disclosure" factor is factually incorrect. The arguments made at pp. 11-13 of their opening brief, and page 6 of their reply brief for the Supreme Court were reflected in the majority opinion, ... U.S. ....., 99 S.Ct. 1667, 1674-75 (1979).[6] On remand to Judge Gray, both Phillips and Douglas dedicated substantial portions of their written opposition to plaintiff's Proposed Evaluation of Need for Grand Jury Secrecy to this issue. Indeed this entire argument is one which should have been addressed to Judge Gray.

Legal Aid II suggests the "adequacy of representation" prong of the FRCP 24(a)(2) test is met by a minimal and rather speculative showing. See slip opinion at 2737. Both of the cases cited for this proposition, *Trbovich v. United Mineworkers*, 404 U.S. 528, 538-39 (1972); *Johnson v. San Francisco Unified Schools District*, 500 F.2d 349, 352-54 (9 Cir. 1974), and *Legal Aid II* itself, involve situations wherein private organizations sought to intervene to supplement government representation which only partially spoke in the groups' perceived interests. *Trbovich* allowed a union member

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[6] In their reply brief for the Supreme Court, defendants went so far as to suggest that business lawyers would be inclined to encourage their witness-clients to be helpful to future grand juries in opening new avenues of inquiry only if they could confidentially advise their clients that the testimony would remain secret, (pp. 2-3). Seriously advancing this argument demonstrates how imaginative and complete defendants' counsel were on this subject.

whose complaint initiated the entire proceeding to speak in his own behalf instead of being completely under the wing of the Secretary of Labor. 404 U.S. at 538-539. *Johnson* allowed parents of elementary school children of Chinese ancestry to intervene in a school desegregation case in part because the school district could not adequately represent their interests. 500 F.2d at 353-54. If Douglas and Phillips had not provided the adversity needed to fairly litigate questions of grand jury secrecy, proposed intervenors would be in a position where *Trbovich* and *Johnson* would clearly be in their favor. As the case stands, the interests of the proposed intervenors have been more than adequately represented. *Blake v. Pallan*, 554 F.2d 947, 954 (9 Cir. 1977).

CONCLUSION

If we were to assume that the Chamber in *Legal Aid II* were permitted to intervene and lost, and then financed an individual member of the Chamber to relitigate the same issues, it would be analogous to the current position of this litigation. The proposed intervention is denied.

DATED: June 4, 1980.

JAMES A. WALSH

Senior United States District Judge

APPENDIX

The following are additions to the findings of fact made by this court in its April 23, 1980 order:

15. Donald Smaltz, counsel for proposed intervenor Martin since no later than March 7, 1978, learned of the decision of the United States Court of Appeals for the Ninth Circuit shortly after it was filed March 20, 1978, and learned of the decision of the United States Supreme Court in *Douglas Oil Co. v. Petrol Stops Northwest*, ... U.S. ....., 99 S.Ct. 1667, (1979), shortly after it was announced on April 18, 1979. (Declaration of Donald Smaltz, executed May 1, 1980, Ex. C [p. 25] to proposed intervenors' May 5, 1980 motion for rehearing.)

16. Following the April 18, 1979 opinion of the Supreme Court it was apparent that plaintiff would pursue its petition in accordance with the mandate of the Court and that the next judicial hearing on the matter would be before the Honorable William Gray, United States District Court Judge for the Central District of California.

17. This court has never been made aware of any attempt on the part of proposed intervenors or their counsel to bring their arguments, oral or written, to the attention of Judge Gray before his written evaluation of February 6, 1980. Hence, this court finds that no such attempt was made.

18. Proposed intervenors and their counsel had

no reasonable expectation that they would be served with notice of any attempt to secure their grand jury testimony by plaintiff, and have demonstrated no reason to believe they would ordinarily be served with such notice by the Department of Justice.

19. Corporate defendants Phillips and Douglas have effectively presented every argument made in the materials lodged by proposed intervenors with the single exception of arguments which might arise from "offhand derogatory comments of a personal nature about certain individuals" allegedly made by Martin in the course of his grand jury testimony.

20. Each and every argument of corporate defendants Phillips and Douglas indicates that the interests of the defendants and the proposed intervenors have *not* diverged since 1975. The interests of corporate defendants and proposed intervenors diverged in 1975 when Douglas obtained, (pursuant to Rule 16(a)(1)(A) of Criminal Procedure), a copy of the grand jury testimony of Martin and Clark and distributed it to codefendant(s) in the criminal action begun by Indictment No. 75-377 in the Central District of California. Neither Martin nor Clark have brought any objections they had at that time to the attention of this court. Hence, this court finds that Martin and Clark expressed no objections to the release of transcripts of their grand jury testimony to Douglas or codefendants allowed by Douglas to read these transcripts. See n. 4, *supra*.

21. The nexus between Douglas and proposed in-

tervenors suggests the possibility that the defendant is attempting to relitigate a long fought legal battle by sponsoring closely allied interests to move for intervention. The court is unable to find either the truth or falsity of this possibility.

22. Plaintiff Petrol Stops Northwest has gone to great lengths to successfully litigate favorable rulings on the petition at issue. It would be seriously and unfairly prejudiced if it were forced to *de facto* relitigate the petition with proposed intervenors.

The following are additions to the conclusions of law made by this court in its April 23, 1980 order:

7. The conduct of Martin and his counsel in not making his intention to intervene known to any court prior to March 27, 1980 evidences a lack of diligence.

8. Plaintiff Petrol Stops Northwest would be greatly and unjustly prejudiced by the arrival of intervenors at this late stage of the proceedings regarding its petition to inspect transcripts of testimony taken before the grand jury.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Miscellaneous No. 5706

PETROL STOPS NORTHWEST, et al.,

Petitioners,

UNITED STATES OF AMERICA

Respondent,

DOUGLAS COMPANY OF CALIFORNIA, et al.,

Real Parties in Interest.

EVALUATION OF NEED FOR GRAND JURY SECRECY AND ORDER TRANSMITTING GRAND JURY TRANSCRIPTS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA

This matter came originally before this Court on Petrol Stops Northwest's motion pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, for the release of certain grand jury materials in *United States v. Phillips, et al.*, Criminal Docket No. 75-377. That Rule 6(e) motion sought the production of grand jury transcripts previously released to Douglas and Phillips as criminal defendants in *United States v. Phillips, supra,*

and documents produced by Phillips and Douglas to the grand jury in that criminal proceeding.

After I ordered the release of the transcripts and documents under a protective order, Douglas and Phillips appealed to the Ninth Circuit, which affirmed my order. On appeal to the United States Supreme Court, the Supreme Court reversed the order, deciding that my role in considering this Rule 6(e) motion should be limited to making a written evaluation of the need for grand jury secrecy, and sending the requested materials to the court where the civil cases are pending, i.e., the United States District Court for the District of Arizona, if I determine that the limited evidence before me shows disclosure might be appropriate.

On September 28, 1979, the Ninth Circuit filed an Order remanding the case to this Court to accomplish, together with the District Court in Arizona, further proceedings in harmony with the opinion of the United States Supreme Court. Pursuant to motion of Petrol Stops the mandate of the United States Supreme Court was spread and filed by me on December 17, 1979. This case is now before this Court under that mandate.

My evaluation of the need for secrecy requires a consideration of the five reasons for grand jury secrecy stated in *U.S. v. Procter & Gamble*, 356 U.S. 677 (1958):

> (1) [T]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its delibera-

> tions, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

(*Douglas Oil Co. of California v. Petrol Stops,* ..... U.S. ....., 99 S.Ct. 1667 at 1673, n. 10). Because the grand jury in this case is no longer sitting and the criminal proceedings have been concluded, the first, second and third and fifth reasons are of no pertinence whatsoever. *(See page 5 hereof)

The fourth reason, that of encouraging free and untrammeled disclosure by persons who have information with respect to the commission of crimes, is pertinent. However, in this case the movants have sought only transcripts previously released to Douglas and Phillips, who already examined the transcripts of the testimony of their employees. Since Douglas and Phillips have that information, there would be no added risk of retaliation by reason of releasing these same transcripts to the movants. Therefore, the fourth reason for secrecy diminishes greatly in importance. I concur, therefore, with the statement of the Ninth Circuit in this case

that the public interest side of the balance, i.e., the need to protect grand jury secrecy, is lightly weighted.

It is also my judgment that based on the record before me and the lightly-weighted need for secrecy, disclosure might be appropriate in this case and that the requested transcripts should be ordered sent to the Arizona District Court.

With respect to the grand jury documents requested by movants, I am reluctant because of their sheer volume to order them sent to Judge Walsh at this time, even though Judge Walsh may well need to look at them in determining whether to release said documents to the movants. Judge Walsh should decide whether he desires to see them prior to determining whether they should be released. They shall be maintained, therefore, under this Court's control until Judge Walsh requests either access to them for their examination, or transmission to him for release to the movants.

IT IS THEREFORE ORDERED:

1. That the written evaluation of the need for grand jury secrecy set forth above and this Order be transmitted to Judge Walsh for his use in making his determination of the movants' Rule 6(e) motion.

2. That all grand jury transcripts previously released to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys, relating to the indictment in *United States v. Phillips, et al.*, Crim-

inal Docket No. 75-377, be sent to The Honorable James A. Walsh, United States District Judge for the District of Arizona, Tucson Division, 55 East Broadway, Tucson, Arizona 85701, for his in camera inspection and his determination pursuant to the Supreme Court's opinion in this case.

3. That all documents produced by Phillips Petroleum Company or Douglas Oil Company of California to the government in connection with the grand jury investigation resulting in the indictment in *United States v. Phillips, et al., supra,* shall be maintained under this Court's control until any request by Judge Walsh for (1) access to them for their examination, or (2) transmission to him for release to the movants.

Dated this 6th day of February, 1980.

WILLIAM P. GRAY
United States District Judge

*The first part of the fifth reason may have some relevance; but, under the circumstances here concerned, the accused having pleaded "nolo", such reason would appear to have little weight in the face of a legitimate interest in having access to the material. This depends upon Judge Walsh's evaluation. Of course, the second part of the fifth no longer is pertinent here.

APPENDIX F

Rule 6. The Grand Jury.

(e) RECORDING AND DISCLOSURE OF PROCEEDINGS.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) GENERAL RULE OF SECRECY. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph ([2]3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(3) EXCEPTIONS.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its

deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceedings; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(4) SEALED INDICTMENTS. The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

APPENDIX G

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 25 1981
STEVAS,

No. 81-691

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CONOCO INC. (formerly Continental Oil Company),
DOUGLAS OIL COMPANY OF CALIFORNIA,
GEORGE EDWARD CLARK
AND WILLIAM L. MARTIN, II,

Petitioners,

v.

PETROL STOPS NORTHWEST,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONOCO INC. (formerly Continental Oil Company),
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v.

PETROL STOPS NORTHWEST,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Conoco Inc., Douglas Oil Company of California, George Edward Clark and William L. Martin, II, respectfully submit this Reply to Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

THE DECISION BELOW DID NOT CORRECTLY APPLY THE CRITERIA AND STANDARDS OF THIS COURT FOR PERMITTING ACCESS TO GRAND JURY MATERIALS

The decision of the Court of Appeals below affirming the order of the district court permitted respondent unrestricted access to *all* of the transcripts and testimony of employees and former employees of Petitioner Douglas Oil Company and its co-defendant Phillips Petroleum Company before the federal grand jury in Los Angeles investigating rebrand gasoline marketing. That order afforded respondent total access to all of the documents produced by those two companies to the grand jury. Access was not limited to any discrete portion of the grand jury transcripts or documents responsive to the alleged showing of any particularized need by respondent. The district court's access order which was affirmed by the Court of Appeals below

did not analyze or explain the relevancy or materiality of this unrestricted release of grand jury materials. It did not properly address the requirements of this Court that access must be limited to those discrete portions of grand jury materials necessary to meet even the alleged showing of particularized and compelling need.

Respondent's only alleged showing for particularized and compelling need to justify access to any grand jury materials was the assertion that the grand jury transcripts and documents were required to impeach, test credibility or refresh recollection of witnesses of Douglas Oil Company and Phillips Petroleum Company in the context of what respondent, in its petition under Rule 6(e) of the Federal Rules of Criminal Procedure, stated to be contradictory or false answers to certain limited interrogatories. Those interrogatories dealt only with the subject of alleged competitive pricing communications between the defendants below and their competitors. The district court in its order granting access to all of the grand jury transcripts and documents in question made no effort to analyze or justify its order in relation to the alleged showing of particularized and compelling need presented by respondent. That court did not even look at or review in any manner the grand jury documents involved[1].

The Court of Appeals below looked only to the unreviewable and purely advisory evaluation made by the Central District of California court of the need for continued grand jury secrecy. It accepted that advisory determination, which on its face only concluded that the need for continued grand jury secrecy weighed relatively lightly, and which did not address, under the limitations of this Court's remand in *Douglas Oil Company* v. *Petrol*

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[1] See App. O to Pet. for Cert., A-59. The district court below could not have known whether the grand jury documents were even relevant or material, much less whether they were required by respondent's allegation of particularized and compelling need, since it did not see the documents.

Stops Northwest, 441 U.S. 211 (1979), the questions of either relevancy and materiality or particularized and compelling need.

Looking solely to that evaluation of grand jury secrecy by the Central District of California court, the Court of Appeals below affirmed the order allowing access by the district court for Arizona without any reference whatever to the point presented on appeal that the particularized and compelling need asserted by respondent in seeking grand jury access did not support the unrestricted and total access allowed by the Arizona court. The Court of Appeals affirmed simply on the conclusion there had been no abuse of discretion in finding, without analysis or reason, that respondent's need for disclosure of the contested transcripts and documents outweighed the need for continued grand jury secrecy. (Dec. of Ct. of App., App. to Pet., A7-A8). The court below brushed aside any meaningful or proper consideration of particularized and compelling need with a one sentence assertion that the district court did not abuse its discretion in determining that respondent had shown a compelling and particularized need to use the transcripts and documents to impeach, refresh recollections and test credibility. No consideration whatever was given to the requirement of this Court in *Douglas Oil Company, supra*, and *United States* v. *Procter & Gamble*, 356 U.S. 677 (1958) that access be limited only to that *discrete* portion of grand jury materials for which a particularized and compelling need is shown. In these respects the Court of Appeals below failed to follow the standards of this Court in *Douglas Oil Company, supra*.

The order of the trial court below suffers the same flaws. That order made no analysis or justification for the complete release of grand jury transcripts and documents requested. Indeed the district court below in its access order of April 3, 1980 stated:

> "6. *There are portions* of these transcripts which could be used by plaintiff to impeach, refresh recollection or test the credibility of witnesses, employees of Douglas or Phillips, who testified before the grand jury." (emphasis supplied)

Yet that court released all transcripts and all documents, without identifying the "portions of these transcripts" which might be relevant to the alleged showing of particularized and compelling need in relation to interrogatories concerning competitive pricing communications. The district court stated that it had examined materials and that "some interrogatory and deposition answers . . . appear inconsistent with material studied *in camera*." Again, it did not analyze or describe the materials in question which might even arguably be inconsistent with other evidence. Access was not tailored to the prerequisite showing of particularized and compelling need alleged by respondent. There was no discrete lifting of the veil of grand jury secrecy. There was no effort to limit access to those discrete portions of transcripts which the district court below might have concluded could be used to impeach, refresh recollection or test credibility of witnesses.

The decisions of this Court in *Douglas Oil Company* v. *Petrol Stops Northwest*, 441 U.S. 211, and *United States* v. *Procter & Gamble*, 356 U.S. 677, require that the district court below limit access in accordance with the standards pertaining to particularized and compelling need and that access be allowed only as to those discrete portions of transcripts which would be necessary under an alleged and proven showing of particularized and compelling need.

Respondent asserts that the "intended doctrine" of this Court permits granting access to grand jury materials merely where the need for disclosure outweighs any reason to continue secrecy. (Br. in Opp., p. 11). Even a lightly weighted consideration of grand jury secrecy does not of itself permit access to grand jury transcripts or documents. *That secrecy still remains as a matter of fundamental judicial policy.* The need for secrecy must still be overcome by a showing of particularized and compelling need, and must be limited to those discrete portions of grand jury materials which are necessary.

The Court of Appeals below did not properly apply the abuse of discretion standard to the appeal of the order of the district court. In looking at abuse of discretion, it looked no farther than to consider the evaluation of grand jury secrecy considerations which had been made by the Central District of California for reference to Arizona. That misconstrues the remand in *Douglas Oil Company* v. *Petrol Stops Northwest*, 441 U.S. 211. The principal point established by this Court in *Douglas Oil Company* was the separation of functions between the court having custody of grand jury documents, which preliminarily was required to consider only the grand jury policy implications of the Rule 6(e) request, and the separate and distinct function of the trial court, which is required to review the request for access against the separate and distinct tests of relevancy and materiality and the standards of particularized and compelling need.

This Court should grant the writ of certiorari to clarify the meaning and application of those standards. Otherwise the action of the district court below and its affirmance by the Court of Appeals will in effect permit any civil litigant to obtain access to any grand jury materials simply upon a showing that the considerations of grand jury secrecy weigh relatively lightly. This would be the case generally with any expired grand jury, where indictments have already been returned, witnesses are not further required for attendance before that grand jury and there is no immediate likelihood of accused persons fleeing before the grand jury could indict them. In other words, where the first three, but not all five prongs of the test under *Procter & Gamble* have been met, the grand jury court would likely reach the same advisory conclusion that was made by the Central District of California court in this case. Under the order of the trial court below, that determination that grand jury secrecy weighs lightly is all that would be significant. There would be no vitality to the distinct requirements of determination of relevancy and materiality and showing of particularized and compelling need.

THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE ISSUES OF INTERVENTION

Respondent contends that there is no conflict between the decision of the Court of Appeals and the decisions of this Court and the Fifth and Eighth Circuit Courts of Appeals in the cases cited in the Petition for Writ of Certiorari, because, respondent contends, the facts of the cases cited are different. (Br. in Opp., pps. 13-14). Petitioners rely upon both the decision of ths Court in *National Association for the Advancement of Colored People* v. *State of New York*, 413 U.S. 345 (1973) and the decisions of the Court of Appeals for the Fifth Circuit in *Stallworth* v. *Monsanto Company*, 558 F2d 257 (5th Cir. 1977), *McDonald* v. *E. J. Lavino Company*, 430 F2d 1065 (5th Cir. 1970) and *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Company*, 420 F2 1103 (5th Cir. 1970), and of the Court of Appeals for the Eighth Circuit in *Kozak* v. *Wells*, 258 F2d 104 (8th Cir. 1960), not for their specific facts but for the holdings and principles established for determining the rights of would-be intervenors on grounds of timeliness.

This Court in *National Association for the Advancement of Colored People, supra*, at 413 U.S. 366, held that determination of timeliness "is not solely dispositive. Timeliness is to be determined from all the circumstances." The courts below conflict with this principle in denying the interventions of Petitioners Clark and Martin solely on the basis of untimeliness, and further in determining the proposed interventions to be untimely based only on the point in time at which the petitioners sought to appear in the trial court, in relation to the time of the hearing then scheduled on the Rule 6(e) petition for access. They failed to consider the question of timeliness in terms of the facts when both Petitioners Clark and Martin in fact knew of their interests

which might be affected by the renewed Rule 6(e) petition pending in the Arizona trial court. The opinion of the Court of Appeals below conflicts with *National Association for the Advancement of Colored People, supra,* in this respect.

The principles for determining intervention are set forth in *Stallworth* v. *Monsanto Company,* 558 F2d 257 (5th Cir. 1977), which stated four factors to be considered in determining timeliness of intervention. (558 F2d at 264-266). Indeed, the facts of *Stallworth,* (compared in Pet. for Writ of Cert. at pp. 14-15), are very much like those in the case below and substantially similar insofar as application of the principles of timeliness are concerned. The most significant test of timeliness for intervention is the first factor addressed by the Fifth Circuit in *Stallworth,* at 558 F2d 264, concerning the length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before petitioning to intervene. In the case below this was not considered by the trial court or the Court of Appeals. Neither Martin nor Clark actually learned of the renewed request for his grand jury transcripts until mid-March, 1980; Martin on March 12, 1980 and Clark not until March 24-25, 1980, as shown by the affidavit in the record below.[2] Their counsel filed papers in the trial court setting forth their interest and objections to the release of their own transcripts on March 28, 1980, within two weeks of the time either petitioner learned of the Rule 6(e) petition, and only three days after Clark first knew.

The decision of the Court of Appeals below also conflicts with this Court's decision in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972) and decisions of the Courts of Appeals for the District of Columbia Circuit in *Hodgson* v. *United Mine Workers,* 473 F2d 118 (1972) and *Natural Resources Defense*

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[2] See Exhibit 1, and note 4, *infra.*

Council v. *Costle*, 561 F2d 904 (1977), and of the Eighth Circuit in *Kozak* v. *Wells*, 278 F2d 104 (1960) on the question of inadequacy of existing representation in seeking intervention. The standards and principles there set forth permit intervention upon a showing only that representation *may* be inadequate. The decision of the Court of Appeals below denies Clark and Martin intervention on the conclusion that Conoco and Douglas Oil Company may have made parallel argument on some points relating to the interests of Clark and Martin. That is not consistent with the standards of this Court and the Courts of Appeals for the District of Columbia Circuit and the Eighth Circuit. As Petitioners pointed out (Pet. for Writ of Cert., at p. 17, n. 5), the trial court had already ordered counsel for Conoco and Douglas Oil Company not to represent former employees, including Clark and Martin, because of possible conflicts of interest.

Respondent suggests that the earlier decision in *Legal Aid Society of Alameda* v. *Dunlop*, 618 F2d 48 (9th Cir. 1980) belies a conflict in the decision below in this case on intervention with the decisions of the Courts of Appeals for the Fifth and Eighth Circuits. This is not the case. While the Ninth Circuit did rely on decisions of the Fifth and Eighth Circuits in the *Legal Aid* case, the decision below has now come into conflict with the authority of the other circuits and *Legal Aid*.

THERE ARE IMPORTANT QUESTIONS OF JUDICIAL POLICY AND LAW WHICH WARRANT DECISION BY THIS COURT UPON CERTIORARI

Respondent denies without any analysis that there are important questions of judicial policy or law which should be considered upon certiorari. The Petition for Writ of Certiorari, at pages 18-21, sets forth several vital questions of law and policy which require the exercise of this Court's authority upon certiorari. First, there is the question of policy in enforcing the earlier mandate of this Court in *Douglas Oil Company of California* v. *Petrol Stops Northwest*, 441 U.S. 211. There is

the further question whether access to grand jury materials is to be limited meaningfully by the standards required under *Douglas Oil Company, supra,* and *United States* v. *Procter & Gamble,* 356 U.S. 677 (1958). Certiorari is required to resolve whether these standards must be followed by the trial court or whether a mere determination that grand jury secrecy considerations weigh lightly dispenses with any further consideration of the other standards required.

Vital questions which have not been decided by this Court, and which were not even raised in the earlier case on remand in *Douglas Oil Company of California* v. *Petrol Stops Northwest, supra,* arise with respect to the interests of Clark and Martin to intervene in Rule 6(e) grand jury access proceedings. The rights of individual witnesses to appear and seek to intervene in Rule 6(e) cases to protect their own interests in the continued secrecy of their personal grand jury testimony should be decided by this Court. Fundamental questions concerning the basic judicial policy of secrecy for the grand jury process require this Court's attention.

Inherent in these questions relating to the rights of individual witnesses to intervene are fundamental due process arguments. These include, *inter alia,* rights of the witnesses under the Fifth Amendment to protect their interests in privacy and secrecy of their grand jury testimony. It is not true, as respondent contends (Br. in Opp., p. 15), that these arguments were not made below or that petitioners Clark or Martin have waived Fifth Amendment arguments.[3] Clark and Martin participated before the trial

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[3] Clark and Martin did raise the question of these constitutionally implicated rights in secrecy and privacy of their grand jury testimony before the Court of Appeals below. In their Opening Brief before the Ninth Circuit, (at pp. 11-13), Clark and Martin, citing, *inter alia, Providence Journal Co.* v. *FBI,* 460 F.Supp. 762, 765-68 (D. R. I. 1978), reversed other grounds, 602 F2d 1010 (1st Cir. 1979) quoted that court's decision that no one could better assert than the witnesses "an interest in personal privacy" in their own grand jury testimony, citing 460 F. Supp. at 766, and that the right

court to establish the threshold protection of their interests by intervention. They were denied opportunity to present the very arguments of due process and constitutional safeguards which are inherent in their position and which have been presented adequately below by their petitions to intervene and arguments to the lower courts.[4] Basic constitutional rights of the magnitude of the Fifth Amendment safeguards cannot be so blandly waived or written off by denying threshold intervention which is the vehicle required to assert protection of those rights.

CONCLUSION

Wherefore, Petitioners respectfully submit that a Writ of Certiorari should be granted to review the questions presented herein.

Respectfully submitted,

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to privacy is a personal and fundamental right protected by the Constitution of the United States, Pub. L. 93-579, Sec. 2(a)(4), December 31, 1974, 88 Stat. 1897 (Opening Brief, p. 13, n. 10).

[4] It does not do to say Clark and Martin had actual notice of the Rule 6(e) hearing (Br. in Opp., at p. 15). When they had that notice in March 1980, they moved very quickly to go before the trial court within only a few days. Their counsel's affidavit on this point is attached as Exhibit 1.

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EXHIBIT I

IN THE

United States District Court

FOR THE DISTRICT OF ARIZONA

PETROL STOPS NORTHWEST,
Plaintiff,
vs.
CONTINENTAL OIL COMPANY,
et al.,
Defendants.

CIV. 73-212 TUC JAW

PETROL STOPS NORTHWEST,
et al.,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent,
DOUGLAS OIL COMPANY OF
CALIFORNIA, *et al.,*
Real Parties in Interest,
WILLIAM L. MARTIN, II and
GEORGE EDWARD CLARK,
Applicants for Intervention.

MISC. No. 5706

DECLARATION OF
STUART P. JASPER

I, STUART P. JASPER, declare:

1. That I am one of the attorneys with Smaltz & Neelley representing George Edward Clark and William L. Martin, II in these proceedings.

2. The following statements are based on my own personal knowledge and, if called as a witness, I could competently so testify under oath.

3. On March 17, 1980, Smaltz & Neelley received petitioner Petrol Stops Northwest's application pursuant to Rule 6(e) for disclosure of grand jury materials in proceeding Misc. No. 5706 of the United States District Court for the Central

District of California, after referral to the United States District Court for the District of Arizona.

4. At the same time on March 17, 1980, Smaltz & Neelley received the memoranda in opposition to the Rule 6(e) petition filed by Douglas Oil Company and Phillips Petroleum Company as "real parties in interest."

5. On March 17, 1980, upon reading the petition and opposition memoranda, I determined that the interests of Smaltz & Neelley's clients, George Edward Clark and William L. Martin, II, were not being advanced in the Rule 6(e) proceeding.

6. Between March 17 and 27, 1980, I performed or assisted in performing the following tasks:

> I read the above-referenced moving papers, undertook legal research and analysis, consulted with our clients, prepared declarations for execution by our clients and me, revised the declarations upon further consultation, prepared a memorandum of points and authorities, notified counsel for petitioner, informed the court by telephone conversation with a law clerk of our intention to file papers and appear in opposition to disclosure, and dispatched our memorandum and supporting declarations for filing by overnight air courier.

7. The above process was slowed somewhat by the presence of Mr. Clark on the East Coast during a portion of the period from March 17 to 27, 1980.

8. In connection with the filing of "Martin and Clark's Opposition to Petition for Disclosure of Grand Jury Testimony and Documents", dated March 27, 1980, (herein "Martin and Clark's Opposition Memorandum"), I did not file a petition for intervention or lodge a proposed complaint-in-intervention. I did not do so because, after researching the reported opinions of this case, I relied on the treatment by Judge Gray, the Court of Appeals, and the Supreme Court of third parties Douglas Oil

Company and Phillips Petroleum Company in hearing the companies' arguments as "real parties in interest." *See* Martin and Clark's Opposition Memorandum at 9-13.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of May, 1980, at Tucson, Arizona.

/s/ STUART P. JASPER
STUART P. JASPER